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# In the Supreme Court of the United States

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

*v.*

CHEROKEE NATION OF OKLAHOMA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian Tribes for the administration of programs the Secretary otherwise would administer himself. The ISDA also provides that the Secretary shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether the ISDA requires the Secretary to pay contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were otherwise insufficient to fully fund those costs and would require reprogramming funds needed for non-contractable, inherently federal functions such as having an Indian Health Service.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars respondent from recovering its contract support costs.

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 334 F.3d 1075. The relevant opinions of the Interior Board of Contract Appeals (App., *infra*, 43a-49a, 50a-73a) are not officially reported, but are available at 01-1 B.C.A. (CCH) ¶ 31,349, and 99-2 B.C.A. (CCH) ¶ 30,462.

### JURISDICTION

The judgment of the court of appeals was entered on July 3, 2003. A petition for rehearing was denied on September 12, 2003 (App., *infra*, 36a-37a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 450j-1 of Title 25 of the United States Code and the applicable appropriations statutes are reproduced at App., *infra*, 81a-115a.

## STATEMENT

This case raises issues concerning the funding of contracts with Indian Tribes that are the same as those presented in *Cherokee Nation* v. *Thompson*, 311 F.3d 1054 (10th Cir. 2002), petition for cert. pending, No. 02-1472 (filed Apr. 3, 2003) (*Cherokee I*). After the United States filed its brief in opposition in *Cherokee I*, the Federal Circuit issued its decision in this case, expressly disagreeing with the Tenth Circuit's decision in *Cherokee I*, as well as the Ninth Circuit's decision in *Shoshone-Bannock Tribes* v. *Secretary, Department of Health & Human Services*, 279 F.3d 660 (9th Cir. 2002). Following the Federal Circuit's denial of rehearing in this case, the United States filed a supplemental brief in this Court in *Cherokee I*, stating that it does not oppose the grant of certiorari in that case. See 02-1472 Gov't Supp. Br. 5 (Sept. 25, 2003). The government suggests that the petition in this case be granted along with *Cherokee I* and that the cases be consolidated for briefing and argument. In the alternative, the Court may wish to hold this petition pending disposition of *Cherokee I*.

**1. The Indian Self-Determination And Education Assistance Act.** The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, was enacted in 1975 to ensure "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal services and programs provided to the Tribes and their members. 25 U.S.C. 450a(b). At the request of a Tribe, the Secre-

tary of Health and Human Services (the Secretary) must enter into a "self-determination contract" with "a tribal organization," under which the tribal organization will "plan, conduct, and administer programs" previously administered by the Secretary for the benefit of the Indians. 25 U.S.C. 450f(a).[1] The Secretary has delegated his authority to enter into self-determination contracts to the Indian Health Service (IHS), the component of the Department of Health and Human Services responsible for providing primary health care for American Indians and Alaska Natives. 25 U.S.C. 13, 1601; 42 U.S.C. 2001. ISDA contracts are not government procurement contracts. They are government-to-government funding arrangements under which the Tribes are, in effect, substituted for a federal agency in the provision of governmental services and the receipt of federal funds. See 25 U.S.C. 450f(a)(1).

The ISDA divides funding of self-determination contracts into two primary components. First, the Secretary must provide funding of no less than the amount the Secretary otherwise would have expended if the relevant program were operated by IHS itself, 25 U.S.C. 450j-1(a)(1), a sum sometimes referred to as the "secretarial amount." See App., *infra*, 4a. Second, the ISDA directs the Secretary to add to that amount certain direct and indirect costs known as "contract support costs," or "CSCs." 25 U.S.C. 450j-1(a)(2). CSCs are costs for "activities that must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," but which normally would not be incurred by

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[1] The ISDA defines "Secretary" to mean either the Secretary of the Interior, or the Secretary of Health and Human Services, or both. 25 U.S.C. 450b(i). This case involves only contracts between an Indian Tribe and the Secretary of Health and Human Services.

the Secretary in his direct management of the program or would have been provided from resources other than those under contract. *Ibid.* In general, contract support costs are calculated by multiplying the amount otherwise payable to the Tribe by an "indirect cost rate" determined by negotiation.[2] In this case, for example, respondent's indirect cost rate was 14.3% for fiscal year 1994, 17.1% for fiscal year 1995, and 12.2% for fiscal year 1996. See App., *infra*, 8a, 75a.

The Secretary's obligation to fund self-determination contracts is limited, however, by 25 U.S.C. 450j-1(b), which is entitled "[r]eductions and increases in amount of funds provided." At issue here is the concluding paragraph of Section 450j-1(b). It states:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b); see also 25 U.S.C. 450j(c) ("The amounts of such [self-determination] contracts shall be subject to the availability of appropriations.").

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[2] Each tribal entity's indirect cost rate is determined through an annual negotiation with the Department of the Interior's Office of the Inspector General, pursuant to Office of Management and Budget Circular No. A-87, 46 Fed. Reg. 9548 (1981); App., *infra*, 7a-8a n.2, although Tribes may request direct contract support costs for certain costs not included in the indirect cost rate. 1 C.A. App. 97-98. The same methodology for calculating contract support costs is reflected in the Annual Funding Agreements negotiated between the contracting Tribes and IHS. See, *e.g.*, *id.* at 171 (fiscal year 1994 funding agreement); *id.* at 276 (fiscal year 1995); *id.* at 344 (fiscal year 1996).

In general, self-determination contracts must incorporate the terms of a model agreement, which includes a similar proviso. See 25 U.S.C. 450*l*(c) (Model agreement, § 1, ¶(b)(4)) (clause stating that, "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement"). In addition, Congress established a mechanism for monitoring any appropriations shortfalls by requiring the Secretary to report "any deficiency in funds needed to provide required contract support costs." 25 U.S.C. 450j-1(c)(2).

Congress enacted a further limit on spending for contract support costs in 1998. Between 1994 and 1998, the committee reports accompanying the annual appropriations for the Department of Health and Human Services and the Indian Health Service had "earmarked" certain sums for contract support costs. See pp. 6-7, *infra*. In 1998, Congress enacted a statutory provision barring IHS from expending more than the sums thus "earmarked" for contract support costs for each relevant fiscal year. In particular, Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-288 (Section 314), provides that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." At the same time, Congress began imposing, in the annual appropriations acts, a statutory cap on payments for contract support costs for succeeding fiscal years.[3]

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[3] See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1583 (1997)

**2. The Current Controversy.** The dispute in this case arises from shortfalls in funding for contract support costs associated with self-determination contracts for fiscal years 1994-1996.

a. *Funding for contract support costs.* In the relevant fiscal years, Congress provided for separate treatment of contract support costs relating to ongoing (*i.e.*, already existing) programs, and those relating to new or expanded programs. For fiscal year 1994, the House Committee on Appropriations recommended that, of the approximately $1.6 billion appropriated to IHS, approximately $135 million be used to pay contract support costs for ongoing programs. See H.R. Rep. No. 158, 103d Cong., 1st Sess. 100, 104 (1993). For fiscal year 1995, the Committee increased that amount to about $146 million. H.R. Rep. No. 551, 103d Cong., 2d Sess. 103 (1994). And for fiscal year 1996, the Committee further increased that amount to $153 million. H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995).

In addition, in each of those years, Congress segregated $7.5 million from the lump-sum Indian Health Services appropriation and specified that it was to be used to pay contract support costs for new or expanded

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("not to exceed $168,702,000 shall be for payments to tribes * * * for [CSCs] associated with ongoing contracts or grants or compacts entered into with the [IHS] prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended"); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-278 to 2681-279 (1998); Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, 113 Stat. 1501A-181 to 1501A-182; Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, 114 Stat. 978-980 (2000); Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 456 (2001); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 260-261 (2003).

programs. The relevant appropriations act in each of those years provided that, "of the funds provided," $7.5 million was to "remain available until expended" in an "Indian Self-Determination Fund," which was to "be available for the transitional costs of initial or expanded tribal contracts." Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1408 (1993); see *Joint Explanatory Statement of the Comm. of Conf.*, 139 Cong. Rec. 24,850 (1993) (conference bill "[e]armarks $7,500,000 for the self-determination fund instead of $8,000,000 as proposed by the House and $7,000,000 as proposed by the Senate"); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2528 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-189 (1996).

Because of chronic congressional under-funding, IHS —in consultation with tribal representatives—developed an allocation policy (ISDM 92-2) to deal with anticipated appropriations shortfalls. 1 C.A. App. 84-92. In accordance with that policy, IHS placed all requests for contract support costs for new or expanded ISDA contracts on a priority list called the Indian Self-Determination Queue. *Id.* at 102. Approved requests for contract support costs for new or expanded projects were then 100% funded on a first-come, first-served basis, as determined by the date on which the request was received, until the $7.5 million Indian Self-Determination Fund for that year was exhausted. *Ibid.* When additional Indian Self-Determination Fund appropriations for new or expanded contract support costs became available the next fiscal year, the IHS would pay the contract support costs to Tribes with outstanding requests on the queue. Unfunded requests

thus remained on the queue in priority order awaiting funding from future Indian Self-Determination Fund appropriations. 2 C.A. App. 449-450. Consistent with the committee reports and appropriations acts, in each of the relevant years, IHS allocated not only the funds necessary to pay the secretarial amounts under ISDA contracts, but also the full amount earmarked in the committee reports for contract support costs for ongoing programs, as well as the full $7.5 million segregated for contract support costs for new or expanded programs. In each of the relevant years, there was nonetheless a shortfall for the payment of contract support costs ranging from $21.9 million to $34.6 million. See Dep't of Health and Human Services, Indian Health Service, *Fiscal Year 1998 Justification of Estimates for Appropriations Committees* 117 (1997).[4]

b. *The government-to-government agreements.* Respondent is a federally recognized Indian Tribe that has operated various IHS-funded health care programs under self-determination contracts for many years. 2 C.A. App. 394-395. On June 30, 1993, respondent entered into a Compact of Self-Governance and associated Annual Funding Agreement with the United States that covered pre-existing programs already subject to self-determination agreements. 1 C.A. App. 70-83.[5]

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[4] In fiscal year 1999, Congress omitted the Indian Self-Determination Fund from the Indian Health Services appropriation. As a result, IHS has changed its contract support cost distribution methodology.

[5] The Tribe and the United States originally entered into a compact pursuant to Title III of the ISDA (25 U.S.C. 450f note (1994)), a demonstration project known as the Tribal Self-Governance Project. After reviewing the results of the project, Congress repealed Title III and enacted, in its place, provisions that permanently establish tribal self-governance programs within

The Compact expressly states that the Secretary's provision of funds to respondent, as specified in the Annual Funding Agreements, will be subject to the appropriation of funds by Congress and subject to such limits as Congress may enact:

> Section 3—Funding Amount. *Subject only to the appropriation of funds by the Congress of the United States,* and to adjustments pursuant to [25 U.S.C. 450j-1], as amended the Secretary shall provide to the [Cherokee] Nation the total amount of funds specified in the Annual Funding Agreement * * *. In accordance with [25 U.S.C. 450f] as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

Compact of Self-Governance Between the United States of America and the Cherokee Nation, Art. IV, § 3 (June 30, 1993) (1 C.A. App. 73) (emphasis added). The Annual Funding Agreement for fiscal year 1994 similarly declared that "[t]he parties agree that adjustments may be made due to Congressional action." 1 C.A. App. 171. Respondent's Annual Funding Agreements for the ensuing fiscal years have similar terms.[6]

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HHS. See Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, §§ 501-519, 114 Stat. 713-731 (codified at 25 U.S.C. 458aaa to 458aaa-18). Because self-governance compacts and self-determination contracts are both subject to the same congressional appropriation mechanism, see 25 U.S.C. 450j-1(b), the terms "contract" and "compact" have been used interchangeably by the parties and the courts.

[6] See, *e.g.*, 1 C.A. App. 277 (funding agreement for fiscal year 1995, which states "that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation

In 1995, because of budgetary shortfalls, the Secretary paid respondent about $3.2 million in contract support costs for ongoing programs, approximately $945,000 less than respondent had sought. In addition, in 1996, respondent requested approximately $777,000 in additional contract support costs for new and expanded programs for which it had assumed responsibility in previous fiscal years. 1 C.A. App. 119. Consistent with the allocation policy that IHS had established in ISDM-92-2 after consultation with tribal representatives, see pp. 7-8, *supra*, the latter request was placed in the Indian Self-Determination queue. 1 C.A. App. 119, 136, 152; 2 C.A. App. 427-428. The request did not reach the top of the queue before the $7.5 million allotted for such costs was exhausted. As a result, respondent did not receive additional funding for contract support costs for new programs in fiscal year 1996.

**3. The Administrative Decisions.** On September 27, 1996, respondent submitted a claim to IHS pursuant to the Contract Disputes Act, alleging that it was entitled to additional contract support costs in the amount of $6,369,009 for fiscal years 1994 through 1996. See App., *infra*, 9a. The IHS contracting officer denied respondent's claim. *Id.* at 74a-78a. The contracting officer explained that, although respondent had a shortfall, the IHS could not meet respondent's full request because: (1) Congress failed to appropriate sufficient funds for contract support costs for all Tribes; (2) respondent's compact and Section 450j-1(b) of the ISDA state that the provision of funds under the Annual Funding Agreements is subject to the availability of appropria-

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notified of such actions."); *id.* at 345 (funding agreement for fiscal year 1996, in which the parties agree "that adjustments may be appropriate due to unanticipated Congressional action").

tions; (3) the Annual Funding Agreements contain various provisions indicating that the amount specified for contract support costs was not a sum certain and that further adjustments would be made based on congressional action and further negotiation between the parties; and (4) Section 450j-1(b) "makes it clear that IHS is not required to meet [respondent's] total need for indirect costs where such action would reduce the funds otherwise available to other tribes." App., *infra*, 76a-77a.

Respondent sought review before the Interior Board of Contract Appeals (the IBCA) pursuant to 41 U.S.C. 606, and the IBCA concluded that respondent was entitled to full payment of its contract support costs. App., *infra*, 50a-73a. The IBCA first rejected the Secretary's reliance on Section 450j-1(b), which makes payments "subject to the availability of appropriations" and provides that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contracts. *Id.* at 67a-68a. The IBCA concluded that IHS had a "sufficient unrestricted lump-sum appropriation available to it" to pay CSCs. *Ibid.*

The IBCA also rejected the Secretary's argument that Section 314 of the Emergency Supplemental Appropriations Act for fiscal year 1999 bars recovery by declaring that the amounts "appropriated to or earmarked in the committee reports" for contract support costs "are the total amounts available for fiscal years 1994 through 1998 for such purposes." The IBCA stated that Section 314 is "merely appropriations Act language" that does not "extinguish" respondent's right to full funding for contract support costs under its agreements. App., *infra*, 69a-71a. The IBCA further concluded that Section 314 did not preclude resort to

the Judgment Fund, 31 U.S.C. 1304, to pay contract support costs. App., *infra*, 71a-72a.

The IBCA denied the Secretary's request for reconsideration. App., *infra*, 43a-49a. The IBCA acknowledged that, under Section 450j-1(b), the Indian Health Service did not need to fund contract support costs fully where appropriations were insufficient and paying contract support costs would result in "the potential reduction of funds to other tribes and other programs." *Id.* at 46a. But it rejected the Secretary's reliance on that provision because, according to the IBCA, many of the affected programs were "clearly discretionary" and the Secretary failed to provide "adequate" or "convincing proof * * * that any actual reduction of funds for other tribes would be required to fully fund" respondent's contract support costs. *Id.* at 47a.[7]

**4. The Federal Circuit's Decision.** The United States Court of Appeals for the Federal Circuit affirmed. App., *infra*, 1a-35a. In so doing, that court expressly "disagree[d] with the approaches of the Ninth and Tenth Circuit[s]," which had upheld the Secretary's position "in nearly identical litigation." *Id.* at 17a-18a.

a. The Federal Circuit agreed that, in general, an agency may not spend in excess of an express limit or cap contained in an appropriations act. App., *infra*, 12a-13a. Nonetheless, the court stated that, in the absence of such a statutory limit, "an agency is *required* to re-

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[7] At the parties' request, the IBCA initially deferred calculating damages pending review in the Federal Circuit. Following the filing of a notice of appeal, however, the Federal Circuit determined that, because no damages had yet been awarded, the IBCA's decision was non-final and therefore unreviewable. App., *infra*, 10a n.4. Accordingly, the parties stipulated to damages of $8.5 million, plus interest from September 30, 1996, and the IBCA entered a final order accepting the stipulation. *Id.* at 12a, 38a-42a.

program if doing so is necessary to meet debts or obligations." *Id.* at 16a.

Addressing contract support costs for ongoing programs first, the court of appeals held that, because there were no express statutory limits on the payment of such costs, the Secretary was required to pay them in full. App., *infra*, 18a-22a. The Federal Circuit did not dispute that the committee reports accompanying the appropriations act for each of the relevant fiscal years recommended specific sums for contract support costs and that those sums were insufficient to pay respondent's requested costs. But the Federal Circuit held that the Secretary had no discretion to follow the allocations set forth in the committee reports, because committee reports cannot render funds unavailable so as to "excuse the Secretary from fulfilling his duty under the contracts * * * to pay full contract support costs." *Ibid.*

The court applied similar analysis to the claim for contract support costs for new or expanded programs. App., *infra*, 22a-26a. The court of appeals noted that, in the appropriations act for each year in question, Congress had segregated $7.5 million for contract support costs for new and expanded programs in the Indian Self-Determination Fund, providing that the $7.5 million fund "shall be available" for that purpose. *Id.* at 22a. The court concluded, however, that the $7.5 million set-aside could not be construed as specifying the full amount available for that purpose because Congress had not used the phrase "not to exceed" or similar language in the appropriations acts. *Id.* at 24a-25a.

The Federal Circuit also rejected the Secretary's reliance on Section 314, which provides that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports

* * * for contract support costs are the total amounts available for fiscal years 1994 through 1998 for such purposes." App., *infra*, 26a. The court stated that respondent's "right to the contract support costs vested long before the passage" of that provision. *Id.* at 27a. The Federal Circuit also refused to read Section 314 as clarifying Congress's intent to limit the funding available for contract support costs in the relevant fiscal years to the amounts earmarked in the committee reports. *Id.* at 29a. Instead, it construed Section 314 to prohibit "the *future* obligation of unspent appropriated funds" for those fiscal years. *Id.* at 29a-30a.[8]

b. The Federal Circuit also rejected the Secretary's contention that funding respondent's contract support costs would have required IHS to reduce funding for programs serving other Tribes. App., *infra*, 31a-34a. Following oral argument, the Federal Circuit twice requested the submission of supplemental briefs and evidence regarding whether there were unobligated funds in IHS's budget at the end of the relevant fiscal years. *Id.* at 31a-32a. Although the government argued that the issue should be addressed by the IBCA on remand—the IBCA having declined the government's request for a hearing on that very issue—the Federal Circuit declined to remand. *Id.* at 33a; see *id.* at 11a. Instead, the Federal Circuit relied on the parties' appellate submissions to make its own findings.

In its supplemental briefs, the government acknowledged that there may have been minor unobligated

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[8] The Federal Circuit also held that Section 314 does not bar respondent from recovering from the Judgment Fund, reasoning that "[d]amages for breach of contract may be awarded out of the Judgment Fund when payment is not otherwise provided for." App., *infra*, 31a (citing *Lee* v. *United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997)).

balances remaining in each of the fiscal years, but explained that those amounts were not sufficient to pay respondent and all of the other Tribes ahead of respondent on the Indian Self-Determination queue their full contract support costs. The government also pointed out that, because IHS's annual lump-sum appropriations were "one-year" funds, those monies are no longer available to pay contract support costs for the fiscal years in dispute. Gov't C.A. Supp. Br. 6-8. Finally, the Secretary provided a line-by-line explanation of how IHS allocated its annual lump-sum appropriation during the relevant fiscal years. Gov't C.A. Rev. Supp. Br. 7-8, Addendum 5a-14a.

Based on those materials, the Federal Circuit found that, in each fiscal year, IHS spent between $25 and $35 million on "inherently federal functions." App., *infra*, 32a. Inherently federal functions are activities "so intimately related to the public interest as to mandate performance by Government employees," including the operation of a federal agency, interpreting the law, entering into contracts, and paying out federal funds. Office of Federal Procurement Policy, Office of Management and Budget, *Policy Letter on Inherently Governmental Functions*, 57 Fed. Reg. 45,100 (1992). Such functions "cannot legally be delegated to Indian tribes." 25 U.S.C. 458aaa(4). According to the Federal Circuit, however, funds used for inherently federal functions do "not constitute 'funding for programs, projects, or activities serving a tribe'" within the meaning of Section 450j-1(b) and thus can be reprogrammed to pay contract support costs for Tribes. App., *infra*, 32a-33a. The court then held such reprogramming to be mandatory, relying on 25 U.S.C. 450j-1(b)(3), which states that ISDA funding "'shall not be reduced by the Secretary to pay for Federal functions.'" App., *infra*, 33a.

## REASONS FOR GRANTING THE PETITION

This case raises the same issues as the petition for a writ of certiorari in *Cherokee Nation* v. *United States*, No. 02-1472 (filed Apr. 3, 2003) (*Cherokee I*). As explained in the supplemental briefs submitted to this Court in *Cherokee I*, see 02-1472 Pet. Supp. Br. 3-6; 02-1472 Gov't Supp. Br. 4, the Federal Circuit's decision in this case conflicts with the decision of the Tenth Circuit at issue in *Cherokee I*, and with the decision of the Ninth Circuit in *Shoshone-Bannock Tribes* v. *Secretary, Dep't of Health & Human Services*, 279 F.3d 660 (2002). In view of that conflict, the government's supplemental brief in *Cherokee I* stated that the government "does not oppose further review in th[at] case." 02-1472 Gov't Supp. Br. 5. For the reasons stated below, if this Court grants the petition for a writ of certiorari in *Cherokee I*, it should grant the petition in this case as well and consolidate the cases for briefing and argument. Alternatively, the petition in this case should be held pending decision in *Cherokee I* and then disposed of as appropriate in light of the decision in that case.

1. This case concerns the extent of the Secretary's obligation to pay contract support costs under Indian Self-Determination contracts. Under the ISDA and the relevant government-to-government funding agreements, the Secretary's obligation to pay such costs is subject to at least two limits. First, such payments are "subject to the availability of appropriations." Second, the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b); pp. 9-10 & note 6, *supra* (agreements). Both limits apply "[n]otwithstanding any other provision" of the ISDA. 25 U.S.C. 450j-1(b).

Those limits reflect the fact that self-determination agreements are not government procurement contracts —they are not purchases for the federal government. Instead, they are governmental funding arrangements under which the Tribes are substituted for a federal agency both in furnishing governmental services and in receiving federal funding for that purpose. See 25 U.S.C. 450f(a)(1); *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51-56 (1986); cf. 25 U.S.C. 450f(d) (deeming employees of tribal entities operating under self-determination contracts to be federal employees for purposes of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674). A federal agency administering programs directly is constrained by the availability of appropriations and the need to allocate funds among competing needs. Section 450j-1(b) makes the same principle applicable to Tribes operating in the agency's stead. In this case, the Federal Circuit misconstrued and misapplied Section 450j-1(b), creating a conflict with the decisions of the Ninth and Tenth Circuits on at least three issues.

a. First, the Federal Circuit disagreed with the Ninth and Tenth Circuits on how to determine the "availability" of appropriated funds within the meaning of Section 450j-1(b). In the relevant years, Congress did not appropriate sufficient money to fund all of the agency's programs serving Tribes, and the committee reports accompanying the appropriation acts identified specific sums to be used for contract support costs. See pp. 6-7, *supra*. The Tenth Circuit held that the Secretary had discretion to follow the committee reports in the face of funding shortfalls. See App., *infra*, 19a-20a (citing *Cherokee I*, 311 F.3d at 1062-1063); 1 General Accounting Office, *Principles of Federal Appropriations Law* 3-34 (2d ed. 1991) (agency with an insufficient

appropriation has "discretion" to establish "reasonable classifications" and "priorities" in allocating funds).

Declaring that it "cannot agree," App., *infra*, 20a, the Federal Circuit held that the Secretary lacked discretion to follow the allocations set forth in the committee reports. In particular, the Federal Circuit held that only express funding caps enacted in the text of an appropriations act or another statute can have the effect of limiting "availability" so as to "excuse the Secretary from fulfilling his duty under the contracts." *Id.* at 21a-22a. Funds are "available," the Federal Circuit stated, whenever the total lump-sum appropriation exceeds the amount obligated by the agency at the moment of the appropriation, without regard for the needs of other programs or the agency's need to operate throughout the year. *Id.* at 27a.

The Federal Circuit's view that appropriations can be rendered "unavailable"—so as to permit non-payment under Section 450j-1(b)—only by an express funding cap is incorrect. An express statutory cap is *by itself* sufficient to bar an agency from obligating or paying funds in excess of the cap, *even absent* a "subject to the availability of appropriations" provision like Section 450j-1(b). App., *infra*, 12a-13a; 31 U.S.C. 1341(a)(1) (prohibiting any officer from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation"). The Federal Circuit's construction thus renders Section 450j-1(b) largely superfluous.

The Federal Circuit's construction also ignores the fact that, in establishing these government-to-government funding arrangements, Congress was not purchasing services from the Tribes, but substituting the Tribes for a federal agency in the provision of services to their members and the receipt of federal funds to

that end. See p. 17, *supra*. Consistent with those arrangements, by making the Tribes' receipt of funds subject to the "availability of appropriations," Section 450j-1(b) constrains the Tribes with the budgetary restrictions the Secretary would face if operating the programs himself. For similar reasons, the Federal Circuit erred in describing the question here as whether the Secretary can be "excused" from "fulfilling his contract obligations" because of under-funding. See App., *infra*, 17a; see *id.* at 27a (finding contractual "right" to contract support costs). The question is whether, given that Section 450j-1(b) and the relevant agreements made the payment obligation itself subject to the "availability" of appropriations, Section 450j-1(b) imposed a payment obligation to begin with, despite the absence of full congressional funding.

The Federal Circuit also parted company with the Ninth and Tenth Circuits on whether the relevant appropriation acts, by establishing a segregated fund for a specified purpose, could be understood to make that segregated fund the full amount "available" for that purpose. In each of the fiscal years at issue here, the appropriation act stated that, "of the funds provided," $7.5 million shall remain available until expended for the "Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts," *i.e.*, for contract support costs for new or expanded contracts. See p. 7, *supra*. Holding the appropriations acts to be ambiguous, the Ninth and Tenth Circuits referred to the relevant legislative history and concluded that Congress had intended the $7.5 million to be the maximum to be spent on contract support costs for new and expanded programs. See App., *infra*, 24a-25a (citing and quoting *Cherokee I*, 311

F.3d at 1063-1064, 1065 n.10; *Shoshone-Bannock*, 279 F.3d at 666).

In this case, the Federal Circuit reached the opposite conclusion, declaring "that the Ninth and Tenth Circuit decisions were incorrect." App., *infra*, 24a. Instead, the Federal Circuit held that the appropriations acts unambiguously made $7.5 million the minimum amount to be spent for that purpose. *Id.* at 25a-26a. Contrary to the Federal Circuit's conclusion, the GAO—which the Federal Circuit deemed to be "expert"—recognizes that the phrase "'shall be available'" can be "said to contain an element of ambiguity." 2 *Principles of Federal Appropriations Law*, *supra*, at 6-7. As the GAO has explained, some decisions have read that language "to constitute a maximum but not a minimum"; others have read it as establishing a minimum only; and more recent decisions hold that "whether it is a maximum or a minimum" ultimately "depends on the underlying congressional intent." *Ibid.* In this case, Congress's declaration that, "of the funds provided," a segregated $7.5 million fund "shall be available for" CSCs for new or expanded contracts is reasonably understood to indicate that the other funds provided are not available for that purpose, particularly given "accompanying Committee Report language stating only $7.5 million was intended to be available * * *, an amount which IHS has duly spent." App., *infra*, 51a-52a.

b. Second, the Federal Circuit's decision squarely conflicts with the decisions of the Ninth and Tenth Circuits on the construction of Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, and its relationship to the "availability" proviso of Section 450j-1(b). As noted above, in each of the relevant fiscal years, the appropriations act

allocated $7.5 million for CSCs for new and expanded contracts, and the committee report identified the total amount to be spent on all contract support costs. Confronted with litigation over the effect of those provisions, Congress enacted Section 314 in 1998 to declare that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681-288. Interpreting that language, the Tenth Circuit held that—whether or not the earmarks in the conference reports were themselves binding in the first instance—Section 314 created a "legally binding" statutory restriction by making those earmarked amounts the total sum that could be used to pay contract support costs. "Congress could not have been clearer as to its intent." *Cherokee I*, 311 F.3d at 1065. The Ninth Circuit reached the same conclusion, declaring that Section "314 is unambiguous. Congress plainly said that the appropriated amounts were the total amounts available." *Shoshone-Bannock*, 269 F.3d at 955-956.

"Once again," the Federal Circuit "disagree[d]" with the Ninth and Tenth Circuits' construction. App., *infra*, 28a-29a. Congress, the Federal Circuit stated, "was merely prohibiting the *future* obligation of unspent appropriated funds" and was not establishing or clarifying that "the earlier statutes imposed a statutory cap." *Id.* at 29a-30a. But Section 314 nowhere proscribes (or mentions) the "future obligation" of "unspent" funds. Rather, Section 314 states that, "[n]otwithstanding any other provision of law," the amounts "appropriated to or earmarked in the committee reports * * * for contract support costs * * * *are the total amounts available* for fiscal years 1994 through

1998 for such purposes." 112 Stat. 2681-288 (emphasis added). It thus unambiguously declares that the appropriated or earmarked amounts—and no more—may be spent on contract support costs for the relevant years.[9]

The Federal Circuit's construction also ignores the provision's legislative history and context. "[I]n several cases," the Senate Report explained, "the Federal courts have held the United States liable for insufficient CSC funding. The Committee believes the situation needs to be addressed." S. Rep. No. 227, 105th Cong., 2d Sess. 52 (1998). Indeed, Section 314 was enacted as part of an annual appropriation that, for the first time, placed statutory caps on funding for contract support costs in the next fiscal year. See pp. 5-6 & note 3,

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[9] For that reason, the Federal Circuit also erred in suggesting that it was permissible to pay contract support costs by awarding damages from the Judgment Fund, 31 U.S.C. 1304. Section 314 declares that the sums "appropriated" or "earmarked" are *"the total amounts available* * * * for such purposes," "[n]otwithstanding *any other provision of law.*" 112 Stat. 2681-288 (emphasis added). By nevertheless authorizing recourse to the Judgment Fund to pay contract support costs, the Federal Circuit contravened an express limit on payments established by Congress. See U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (resort to Judgment Fund not proper unless Congress established a right to money); *Rochester Pure Waters Dist.* v. *EPA*, 960 F.2d 180, 185-186 (D.C. Cir. 1992) (no funds available where Congress rescinds the appropriation); *City of Houston* v. *HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (where "the relevant appropriation has lapsed or been fully obligated * * * the federal courts are without authority to provide monetary relief"). That result is particularly inappropriate given that, under the Contract Disputes Act, the responsible agency must reimburse the Judgment Fund from appropriated funds. See 41 U.S.C. 612(a) and (c).

*supra*. Section 314 thus was clearly intended to establish a similar statutory cap for the preceding fiscal years by incorporating the appropriations or earmarks in the committee reports for the prior years into an Act of Congress as binding law.

The Federal Circuit's contrary construction makes no sense on its own terms. That court nowhere explained why Congress would have thought it necessary or useful to bar the "future obligation" of "unspent" funds from the earlier years, given that the agency automatically loses the ability to obligate such "one-year" funds at the end of each fiscal year. See 31 U.S.C. 1301(c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears").[10] Moreover, when Congress enacted Section 314 in 1998, IHS had informed Congress, pursuant to 25 U.S.C. 450j-1(c)(2), that it had exhausted its appropriations and that the appropriated money was insufficient to pay the full amount of contract support costs required by the Tribes. See *1998 Justifications of Estimates*, *supra*, at 116-117. The Federal Circuit made no effort to explain why Congress would have sought to bar the "future obligation" of "unspent" funds after being advised that there were no unspent funds left for that purpose.

c. Third, the Federal Circuit's decision in this case appears to depart from the Tenth Circuit's approach when determining the "availability" of funds needed for inherently federal functions, and whether reprogram-

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[10] Congress provided that the $7.5 million Indian Self-Determination Fund for new and expanded contracts would "remain available until expended," but it is undisputed that the agency exhausted that $7.5 million fund. See App., *infra*, 22a n.12, 51a-52a.

ming such funds to pay contract support costs would "reduce funding for programs, projects or activities serving a tribe," 25 U.S.C. 450j-1(b). In *Cherokee I*, the district court found, and the Tenth Circuit agreed, that funds may be unavailable for contract support costs in view of competing demands on IHS's limited resources. Those courts, moreover, did not question that funds required to perform "inherently federal functions"—operations that cannot be contracted out to the Tribes, such as having an Indian Health Service, interpreting relevant laws, entering into contracts, and paying out federal funds—are not meaningfully "available" to pay contract support costs. Nor did they question that eliminating inherently federal functions (in effect shutting the agency down) would adversely affect other "activities serving a tribe" within the meaning of 25 U.S.C. 405j-1(b). In this case, in contrast, the Federal Circuit concluded that those funds nevertheless are "available" to pay contract support costs. App., *infra*, 32a-33a. Indeed, the court concluded that 25 U.S.C. 405j-1(b)(3) actually *precludes* IHS from using funds to perform inherently federal functions where there is a shortfall for a Tribe's contract support costs. App., *infra*, 33a.

Once again, the Federal Circuit erred. To the extent the Federal Circuit construed Section 450j-1(b)(3) as deeming funds "available" even though those funds are needed for inherently federal functions, it is absurd. Under that approach, for example, virtually all of IHS's budget for federal functions in 1996 (about $35.9 million) would be deemed "available" for, and would have had to be reprogrammed to pay, the $34.6 million shortfall for contract support costs for Tribes for that year. Because an agency cannot spend or obligate sums beyond those appropriated, that would have required

the agency to fire virtually all of its employees and to cease operating. Section 450j-1(b)(3), and the concept of "availability" generally, cannot reasonably be understood to require that result. The consequences would be not merely to vitiate Congress's direction that the Indian Health Service exist and that it fulfill its statutory mission of serving the Indian Tribes and their members;[11] it would also place the ISDA at war with itself. The ISDA cannot function—no funding arrangements with the Tribes can be negotiated and satisfied—absent a functioning IHS with employees who can engage in the inherently federal function of entering into the agreements and authorizing payment thereunder. The court of appeals' construction thus contravenes this Court's direction that an Act of Congress "cannot be held to destroy itself," *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (quoting *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)), and ignores the need to "make sense rather than nonsense out of the *corpus juris*," *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991). In any event, because serving the health interests of the Tribes and their members *is* IHS's function, any requirement that the agency in effect shut down to pay certain Tribes' contract support costs would inevitably impair other "activities serving a tribe," something that Section 450j-1(b) expressly says the Secretary is not required to do.

To reach the contrary result, the Federal Circuit relied on Section 450j-1(b)(3), which states that "[t]he amount of funds required by subsection (a)" of Section

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[11] See, *e.g.*, 25 U.S.C. 1631 (establishing IHS); 25 U.S.C. 1601(a) (health services are "required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people").

450j-1 "shall not be reduced by the Secretary to pay for Federal functions, including but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring." 25 U.S.C. 450j-1(b)(3). But the provisos limiting the Secretary's obligations—that "the provision of funds * * * is subject to the availability of appropriations" and that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for self-determination contract costs—apply "*[n]otwithstanding any other provision in this subchapter*," 25 U.S.C. 450j-1(b) (emphasis added), necessarily including Section 450j-1(b)(3). "[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

In any event, this case does not involve a Secretarial decision to "reduce" funding to the Tribes to pay for federal functions within the meaning of Section 450j-1(b)(3). The funds devoted to those functions have never been treated as available to pay for services the Tribes provide under contract to begin with, precisely because the Tribes cannot perform inherently federal functions. Indeed, 25 U.S.C. 450f(a) states that the activities that may be the subject of an ISDA contract with a Tribe include only those administrative functions "that are otherwise contractable." See also 25 U.S.C. 458aaa(4) (for purpose of Tribal Self-Governance Program, "inherent Federal functions 'means those federal functions which cannot legally be delegated to Indian tribes'"). That provision necessarily presupposes that there are inherently federal functions that must be performed by IHS, and that funds must be paid out of

the lump-sum appropriation to support them. And the Secretary did not "reduce" contract support payments to the Tribes from one year to the next; the Secretary simply declined to *increase* them beyond the increases identified by the committee reports in light of limited appropriations.

2. In light of the circuit conflicts described above, the government, in its supplemental brief in *Cherokee I*, did not oppose the petition for a writ of certiorari in that case. At the same time, as also noted in the government's supplemental brief in that case, the conflicts may not have broad forward-looking significance. Since fiscal year 1998, Congress has regularly included express caps on funding for contract support costs in the annual appropriations legislation funding Indian Self-Determination Contracts. See p. 6 & note 3, *supra*. There is no disagreement that such express caps render payments beyond the amounts specified "unavailable" within the meaning of the ISDA. See App., *infra*, 12a-13a (citing cases). As a result, disputes such as the present one, which concern the availability of money for the purpose of IHS's payment of contract support costs, are unlikely to arise in the future. There are, however, several pending cases (including two putative class actions) that concern years before Congress began to use express funding caps. As a result, the Indian Health Service could face liability of up to $100 million.

In addition, the Federal Circuit's decision may have significant ongoing programmatic consequences for the Indian Health Service if that decision is read to hold that funds needed for inherently federal functions—including having an IHS that can enter into contracts with Tribes and administer programs for which IHS remains directly responsible—are nevertheless deemed to be "available" to pay Tribes under the ISDA. See

pp. 24-25, *supra*. As explained above (see *ibid.*), such a construction could impair the agency's operation, impede administration of programs for the benefit of the Tribes, and prevent administration of the ISDA itself. In the same way, the decision could also have adverse consequences for the Department of the Interior. Because of those concerns in particular, review by this Court does seem warranted.

As between this case and *Cherokee I*, the decision in *Cherokee I* has the benefit of a full record compiled in trial court, as well as concurrent findings of fact by the district court and court of appeals. Those features may help limit factual disputes that could complicate decision of the legal issues.[12] This case, in contrast, is marred by the Federal Circuit's effort to develop a factual record on appeal through post-argument briefing, as well as the questionable appellate factfinding that resulted.[13] Because the government had not yet

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[12] See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (Court generally will not revisit the "concurrent findings of fact by two courts below") (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); *United States* v. *Doe*, 465 U.S. 605, 614 (1984). As the government's Brief in Opposition in *Cherokee I* explained, petitioners in that case have suggested disagreement with the district court's and the court of appeals' conclusion that the Secretary had exhausted appropriated funds. See 02-1472 Br. in Opp. 15 n.5. The Court, however, could decline to entertain that contention in view of the concurrent finding rule in *Goodman*, and because petitioners in that case failed to present the supposed evidence of unspent funds (a Presidential budget report) to the district court in a timely fashion. See 02-1472 Br. in Opp. 15 n.5.

[13] For example, the Federal Circuit concluded that, even setting aside the sums spent on inherently federal functions, the agency had minor unexpended balances (ranging from $1.25 million to $6.8 million) at the end of some of the relevant years. That "finding" would not, however, bar this Court's review of whether money required to perform inherently federal functions is "available" within

completed its ordinary processes for considering the filing of a petition for a writ of certiorari in this case at the time it filed its supplemental brief in No. 02-1472, those differences were not so immediately obvious. Thus, to the extent review of the issues here is appropriate, the superior record in *Cherokee I* now seems, on balance, to weigh in favor of granting review in that case.

As the government's Supplemental Brief in *Cherokee I* notes (at 4), however, there is one issue with respect to which this case appears to be a superior vehicle. While the Federal Circuit expressly addressed the effect of Section 450j-1(b)(3), the Tenth Circuit's decision in *Cherokee I* does not, primarily because petitioners did not timely press that provision before the Tenth Circuit in *Cherokee I*. Nonetheless, Section 450j-1(b)(3) was mentioned in the Tribes' opening brief in the court of appeals in *Cherokee I*, and the Tribes relied on it more expressly in their petition for rehearing. Moreover, the Tribes rely on that provision in their petition in *Cherokee I* in this Court to support their contention that the ISDA supports their position. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Under these circumstances, we are not prepared to object to addressing Section 450j-1(b)(3) in *Cherokee I*, especially since

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the meaning of Section 450j-1(b). First, the allegedly unexpended sums would not be sufficient to pay respondent and the numerous Tribes ahead of respondent in the self-determination queue in full. Indeed, in the relevant years, the contract support cost shortfalls ranged between $21.9 million and $34.6 million. Second, the panel ignored the government's concern that the cited surpluses often were comprised of money that was not actually available during the relevant fiscal year, but appeared later because of accounting adjustments. See 31 U.S.C. 1552(a), 1553.

that provision was addressed by the Federal Circuit in this case, which also involves the Cherokee Nation.

Nonetheless, if the Court concludes that review is warranted on the issues raised in these funding disputes, the most prudent course would be to grant the petitions for a writ of certiorari in this case and in *Cherokee I* and to consolidate the cases for both briefing and argument. That would ensure full consideration of all issues. In the alternative, if the Court wishes to review only one case, the government is on balance inclined to favor review in *Cherokee I*, in view of its superior record and concurrent findings of fact.

## CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for briefing and argument with *Cherokee Nation of Oklahoma, et al.* v. *United States*, No. 02-1472 (*Cherokee I*). In the alternative, the petition in this case should be held pending the decision in *Cherokee I* and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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DECEMBER 2003

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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No. 02-1286

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHEROKEE NATION OF OKLAHOMA, APPELLEE

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JULY 3, 2003

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**OPINION**

Before: CLEVENGER, SCHALL, and DYK, Circuit Judges.

DYK, Circuit Judge.

This case raises the question of whether the Secretary of the Department of Health and Human Services ("the Secretary") breached his contracts with the Cherokee Nation of Oklahoma ("the appellee"), entered into pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("ISDA").

The Department of the Interior Board of Contract Appeals ("the Board") determined that the Secretary breached his contracts for the fiscal years 1994, 1995,

and 1996, by failing to pay the full indirect costs of administering federal programs. *In re Cherokee Nation of Okla.*, IBCA Nos. 3877-79, 99-2 B.C.A. (CCH) ¶ 30,462, 1999 WL 440045 (Interior B.C.A. 1999) ("*Cherokee I*") *reconsideration denied, In re Cherokee Nation of Okla.*, IBCA Nos. 3877-79, 01-1 B.C.A. (CCH) ¶ 31,349, 2001 WL 283245 (Interior B.C.A. 2001) ("*Cherokee II*"). By statute, the Secretary's obligation to pay was "subject to the availability of appropriations," and the Secretary was "not required to reduce funding for programs, projects, or activities serving a tribe" in order to make the payments. 25 U.S.C. § 450j-1(b) (2000).

We hold that there were available appropriations to pay the appellee its full indirect costs, because there were no statutory caps on funding in the appropriations acts for the relevant fiscal years, and that the Secretary has not shown that full payment would require the Secretary "to reduce funding for programs, projects, or activities serving [another] tribe."

We therefore affirm the judgment of the Board.

## BACKGROUND

### I

Before the enactment of the ISDA in 1975, service programs benefiting the Indian tribes were operated almost exclusively by the federal government. The ISDA was designed to make a major change in this approach. Congress was apparently concerned that:

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities

> by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and it has denied to the Indian people an effective voice in the planning and implementing of programs for the benefit of Indians which are responsive to the needs of the Indian community.

S. Rep. No. 93-762, at 12 (1974).

The ISDA had the stated purpose of "permit[ting] an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." ISDA, Pub. L. No. 93-638, § 3(b), 88 Stat. 2203, 2204 (1975) (codified as amended at 25 U.S.C. § 450a(b) (2000)). In order to transfer the programs from federal to tribal control, the statute required the Secretary to enter into contracts with the tribes, under which the tribes would administer the previously federal programs. The statute provided, "[t]he Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof." *Id.* § 102(a), 88 Stat. at 2206 (codified as amended at 25 U.S.C. § 450f(a)(1) (2000)).

The statute required that the tribes receive the full amount of federal funds that the programs would have received had the Secretary continued to operate them directly: "The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof." *Id.* § 106(h), 88

Stat. at 2211 (codified as amended at 450j-1(a) (2000)). This amount is often called the "secretarial amount."

By 1987, many tribes were "undertaking their own education, health, and job-training programs." S. Rep. No. 100-274, at 2 (1987). The transition, however, was not without problems. The tribes complained that they were not receiving amounts sufficient to cover the full administrative costs of the programs. *See generally, Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380-84 (Fed. Cir. 1999) (Gajarsa, J., concurring). One of the reasons for this deficiency apparently was that the "secretarial amount" required to be paid by section 106(h) of the original statute included only the funds that the Secretary would have provided to operate the programs directly, but did not include additional administrative costs that the tribes incurred in their operation of the programs, which the Secretary would not have directly incurred (for example, the cost of annual financial audits, or the cost of administrative resources that the Secretary could draw from other government agencies). At an oversight hearing, "witnesses explained that the failure of Federal agencies to reimburse tribes for the cost of program operation has resulted in a tremendous drain on tribal financial resources." S. Rep. No. 100-274, at 7 (1987). The committee concluded that:

> [p]erhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for

> tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. *It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.*

*Id.* at 8-9 (emphasis added).

Partly in response to this problem, Congress passed the Indian Self-Determination Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (codified as amended at 25 U.S.C. §§ 450-450n (2000)) (1988), which required that the Secretary provide funds for the full administrative costs to the tribes. The amended statute provides, "[t]here *shall be added* to the [secretarial amount] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C § 450j-1(a)(2) (2000) (emphasis added).[1] The statute also

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[1] "Contract support costs" are defined as:

> an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure

provides, "[t]he amount of funds required by subsection (a) of this section (1) *shall not be reduced* to make funding available for contract monitoring or administration by the Secretary," and "(3) *shall not be reduced* by the Secretary to pay for Federal functions." *Id.* § 450j-1(b) (emphases added). The committee explained, "[a] new section 106 is added to the Act to clarify provisions for funding self-determination contracts, including indirect costs. This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government." S. Rep. No. 100-274, at 30.

Under the amended statute, there are only narrow exceptions to this obligation of the government to pay full contract support costs. One of these exceptions states that "[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (2000) ("availability clause"). Another exception provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." *Id.*

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compliance with the terms of the contract and prudent management, but which

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2) (2000).

II

Beginning in 1983, the appellee, the Cherokee Nation of Oklahoma, entered into contracts with the Secretary under the ISDA, to operate hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs, all of which were formerly operated by the Secretary. This case concerns indirect costs under the contracts for fiscal years 1994, 1995, and 1996. Indirect costs are "administrative or other expense[s] related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program." 25 U.S.C. § 450j-1(a)(3)(ii) (2000).

On June 30, 1993, the appellee and the Secretary agreed to a "Compact of Self-Governance" pursuant to the ISDA, Title III—Tribal Self-Governance Demonstration Project. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, §§ 301- 306, 102 Stat. 2285, 2296-98. The ISDA requires that every self-determination contract incorporate the terms of a model agreement, which is provided by 25 U.S.C. § 450*l*(c). The compact at issue here incorporated all of the terms of this model agreement. The compact provided that the appellee and the Secretary would negotiate annual funding agreements, which would be treated as incorporated into the compact. Indirect costs were negotiated pursuant to Office of Management and Budget Circular A-87 as a predetermined fixed percentage of the base funding for the health programs.[2] The direct funding for the con-

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[2] Office of Management and Budget Circular A-87 provides, in pertinent part:

tract for those years was: $18,377,612 for 1994, $24,332,802 for 1995, and $24,681,697 for 1996. The negotiated rates to determine indirect costs were: 14.3% for fiscal year 1994; 17.1% for fiscal year 1995; and 12.2% for fiscal year 1996.

The compact required the Secretary to pay the full amount of funds negotiated in the annual funding agreements, subject only to the narrow exceptions provided by section 450j-1(b) and to any specific directives in applicable appropriations acts:

> Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to [25 U.S.C. § 450j-1(b)] the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1. . . . [T]he use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

(J.A. 73.) The Secretary did not pay the required amounts in full. The dispute here concerns the meaning

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A predetermined fixed rate for computing indirect costs applicable to a grant may be negotiated annually in situations where the cost experience and other pertinent facts available are deemed sufficient to enable the contracting parties to reach an informed judgment (1) as to the probable level of indirect costs in the grantee department during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect cost.

Principles for Determining Costs Applicable to Grants and Contracts With State, Local, and Federally Recognized Indian Tribal Governments, 46 Fed. Reg. 9548, 9550 (Jan. 28, 1981).

of the section 450j-1(b) limitations, and whether they justified the Secretary's nonpayment.[3]

III

On September 27, 1996, the appellee submitted a claim to the contracting officer under the Contract Disputes Act, 41 U.S.C. §§ 601-613, alleging that the Secretary had not paid the full indirect costs to which it was entitled for fiscal years 1994, 1995, and 1996. The appellee claimed that it was owed $1,769,148 for 1994, $2,794,595 for 1995, and $1,805,266 for 1996, for a total claim of $6,369,009. On October 31, 1997, in a final decision, the contracting officer denied the claim.

On January 27, 1998, the appellee appealed from the contracting officer's decision, alleging that the Secretary's failure to pay the full indirect costs constituted a breach of contract and a violation of the ISDA, and seeking damages in the amount of $7,040,358.52. (The reason for the increase in the claimed amount is unclear.)

On December 31, 1998, the Secretary moved to dismiss the appeal. The Secretary argued that under 25 U.S.C. § 450j-1(b), he was not obligated to pay full contract support costs. The Secretary urged that there was a lack of "available funds" under the 1994, 1995, and 1996, appropriations acts. The Secretary's sole argument in this respect was that there were specific recommendations of funding amounts for contract sup-

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[3] Because in the Secretary's view there were insufficient available appropriations to pay the tribes their full contract support costs, the Secretary implemented an allocation policy, whereby unpaid tribes were placed in a queue and paid from future appropriations according to the date of each tribe's individual request. Indian Health Service Circular No. 96-04 (Apr. 12, 1996).

port costs in the appropriations committee reports, and that section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998) ("section 314"), made those committee report recommendations retroactively binding. The Secretary argued that "Section 314 establishe[d] the 'total amounts' available for [contract support costs]" were the amounts recommended in committee reports, Secretary's Motion to Dismiss, at 8 (Dec. 31, 1998), and that "section 314 ha[d] the retroactive effect of extinguishing Cherokee's . . . claims." *Cherokee I*, 99-2 B.C.A. (CCH) at 150,494, 1999 WL 440045.

On June 30, 1999, the Board granted summary judgment of entitlement to the claims in favor of the appellee. *Id.* at 150,495. The Board held that there was no clear indication that Congress intended section 314 of the 1999 appropriations act to modify or repeal the Secretary's obligation to provide full indirect contract support costs under the ISDA or to authorize the Secretary to abrogate his past existing contractual obligations. The Board directed the parties to reach an agreement on quantum for the breach of contract within 60 days. *Id.*[4]

On March 27, 2000, the Secretary moved for reconsideration of the Board's decision. The Secretary argued that our court's decision in *Oglala Sioux*, which issued after the Board's initial decision, required reconsideration of the Board's grant of summary judgment.

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[4] The Secretary appealed the Board's decision to this court, but we dismissed the appeal, holding that the Board's order was not final. *Sec'y of Health & Human Servs.* v. *Cherokee Nation of Okla.*, No. 00-1056, 2000 WL 290337 (Fed. Cir. Feb. 25, 2000).

In *Oglala Sioux*, we held that language in the 1995 appropriations act funding the Bureau of Indian Affairs stating that "not to exceed $95,823,000 shall be for payments . . . for contract support costs" constituted a statutory cap on appropriations that excused the agency from paying full contract support costs under the availability clause of section 450j-1(b). 194 F.3d at 1376, 1378. The Secretary admitted before the Board that, unlike *Oglala Sioux*, "[t]his case does not involve a statutory cap on appropriations, and, at first glance, the lump sum appropriations . . . may appear more than adequate to make full payment." Appellee's Motion for Leave to Move for Reconsideration, at 10 (Mar. 27, 2000). However, the Secretary now argued that by virtue of section 450j-1(b), he was not required to pay full contract support costs because doing so would require a reduction of funds for programs serving other tribes. The Secretary argued that there was at least a dispute of material fact on this issue that precluded summary judgment.

On March 21, 2001, the Board denied rehearing. *Cherokee II*, 01-1 B.C.A. (CCH) at 154,801, 2001 WL 283245. The Board held that, unlike *Oglala Sioux*, there were no statutory caps on available appropriations for contract support costs, and that earmarks in committee reports were not binding on the Secretary. The Board also held that the Secretary "ha[d] provided neither adequate nor convincing proof in this case that any actual reduction of funds for other tribes would be required to fully fund [the appellee's contract support costs]." *Id.* at 154,800. The Board, therefore, reaffirmed its grant of summary judgment for the appellee on the issue of entitlement.

On November 15, 2001, the Board accepted the parties' joint stipulation on quantum and ordered damages in favor of the appellee in the amount of $8,500,000.

The Secretary timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10). We review the grant of summary judgment without deference. *Oglala Sioux*, 194 F.3d at 1377.

## DISCUSSION

### I

The question is whether the Secretary breached his funding agreements with the appellee for the fiscal years 1994, 1995, and 1996, by failing to pay full indirect contract support costs. This issue does not come to us on a blank slate. Several fundamental principles of appropriations law, as enunciated by the Supreme Court, by this court, by our predecessor court, and by other circuits are relevant to this case. These decisions have relied on the opinions of the General Accounting Office ("GAO"), as expressed in Principles of Federal Appropriations Law ("GAO Redbook"), and on the opinions of the Comptroller General, both of whose opinions, while not binding, are "expert opinion[s], which we should prudently consider." *Delta Data Sys. Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984); *see also Lincoln* v. *Vigil*, 508 U.S. 182, 192, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993) (relying on GAO Redbook at 6-159); *Assoc. of Civilian Technicians* v. *Fed. Labor Relations Auth.*, 269 F.3d 1112, 1116 (D.C. Cir. 2001).

The first principle is that, if there is a statutory restriction on available appropriations for a program, either in the relevant appropriations act or in a sepa-

rate statute, the agency is not free to increase funding for that program beyond that limit. *Oglala Sioux*, 194 F.3d at 1376, 1378. In *Oglala Sioux* we found such a restriction in the appropriations act itself. *Id.* In *Sutton* v. *United States*, 256 U.S. 575, 56 Ct. Cl. 477, 41 S. Ct. 563, 65 L. Ed. 1099 (1921), the Supreme Court found that language in a separate statute imposed a statutory cap on appropriations when the separate statute provided that "no contract 'for any public improvement . . . shall bind the Government to pay a larger sum of money than the amount in the Treasury appointed for the specific purpose.'" *Id.* at 578, 41 S. Ct. 563.

The second principle is that Congress generally uses standard phrases to impose a statutory cap. GAO Redbook at 6-4 ("[C]ertain forms of appropriation language have become standard."). The most common language in appropriations acts provides that funds allocated to a specific program are "not to exceed" a particular amount. *See, e.g.*, *Oglala Sioux*, 194 F.3d at 1376, 1378; *Nat'l Ass'n of Reg'l Councils* v. *Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977) (interpreting "not to exceed" appropriations language as placing a statutory cap on appropriations); Appropriations Restrictions Prohibition Clause, 64 Comp. Gen. 263, 264 (1985) (interpreting "not to exceed $15,000" as "susceptible of but one meaning which is that the [agency] may not expend more than $15,000"); see also GAO Redbook at 6-5 to 6-8 ("[T]he most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than.' . . . These are all phrases with well-settled plain meanings.").

The third established principle of appropriations law is that in order for a statutory cap to be binding on an

agency, it must be carried into the legislation itself; such a cap cannot be imposed by statements in committee reports or other legislative history. As the Supreme Court noted in *Lincoln*:

> a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and *indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.*

508 U.S. at 192, 113 S. Ct. 2024 (emphasis added) (citations omitted). To be sure, legislative history can be used as an interpretive guide to determine whether language in an appropriations act constitutes a statutory cap. *United States* v. *Dickerson*, 310 U.S. 554, 561, 60 S.Ct. 1034, 84 L. Ed. 1356 (1940). However, legislative history itself is not binding on an agency and does not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *Am. Hosp. Ass'n* v. *Nat'l Labor Relations Bd.*, 499 U.S. 606, 616, 111 S. Ct. 1539, 113 L. Ed. 2d 675 (1990), *quoted in Lincoln*, 508 U.S. at 192, 113 S. Ct. 2024. Our predecessor court in *Blackhawk Heating & Plumbing Co.* v. *United States*, 224 Ct. Cl. 111, 622 F.2d 539 (1980) specifically held that statements in committee reports and at hearings expressing disapproval of the agency's reprogramming did not constitute statutory caps on available appropriations. *Id.* at 544-46.

The fourth principle is that when there is a lump-sum appropriation without a statutory cap, an agency is free

to reprogram funds from that appropriation from one activity to another. The GAO defines "reprogramming [as] the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation. In other words, it is the shifting of funds from one object to another *within* an appropriation." *GAO Redbook* at 2-25 (emphasis in original). "The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary." *Id.*; *see also LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975). Hence, unless there is a specific "statutory cap" on the use of lump-sum appropriations, or a specific restriction in other legislation, an agency is not restricted in its ability to reprogram.

This view of the scope of the reprogramming authority was confirmed by the Supreme Court in *Lincoln*. 508 U.S. at 192, 113 S. Ct. 2024. In *Lincoln*, the Indian Health Service redirected funding for a program that had previously been funded out of its lump-sum appropriation. The tribe contended that the Indian Health Service was obligated to continue to fund the program from lump-sum appropriations in later years. The Court disagreed, holding that, because the appropriations legislation merely provided a lump-sum appropriation without further restriction, the agency was free to reprogram funds. *Id.* at 192 (citing *GAO Redbook* at 6-159). The Court based its conclusion on "a fundamental principle of appropriations law . . . that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'" *Id.* at 192 (*quoting LTV Aerospace Corp.*, 55 Comp.

Gen. at 319). Our predecessor court also recognized this principle in *Blackhawk*, in which we stated:

> the budget estimates presented to the Congress, and on the bases of which a lump-sum appropriation is subsequently enacted, are not binding on the administrative officers unless those items (and their amounts) are carried into the language of the appropriations act itself, see 17 Comp. Gen. 147, 150 (1937), or . . . there exists a statute that places a general and continuing restriction upon any agency's right to shift funds within an appropriation account.

622 F.2d at 547 n.6.

The final relevant principle of appropriations law is that, in the absence of a statutory cap or other explicit statutory restriction, an agency is *required* to reprogram if doing so is necessary to meet debts or obligations. In other words, "[i]n some situations, the agency's discretion may rise to the level of a duty." *GAO Redbook* at 2-26. This was the holding of the court in *Blackhawk*. 622 F.2d at 553. In *Blackhawk*, the agency defended its failure to pay fully under the terms of a settlement agreement by pointing to a provision of the agreement that the agency's liability was "contingent upon the availability of appropriated funds from which payment in full can be made." *Id.* Because there was no statutory restriction on the reprogramming authority with respect to past due obligations, our predecessor court held that the agency was obligated to make the payments and was liable for breach of contract when it declined to do so. *Id.* at 553; *see* also H. R. Rep. No. 105-609 at 57 (1998) ("Without a ceiling on contract support, the Bureau [of Indian Affairs] could

be required to reprogram from other tribal programs in the Operation of Indian Programs to fund 100 percent of tribal contract support costs.").[5]

II

Against these principles, we consider the Secretary's core argument that he was excused from fulfilling his contract obligations in the present case by the availability clause of 25 U.S.C. § 450j-1(b). That clause provides that "[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (2000).

The Secretary's various arguments under this clause are confusing and contradictory, and depart from arguments the Secretary made before the Board and in similar litigation in the Ninth and Tenth circuits. Nonetheless, in nearly identical litigation in the Ninth and Tenth Circuits involving the same statutory language, the Secretary prevailed. *Cherokee Nation of Okla.* v. *Thompson*, 311 F.3d 1054, 1066 (10th Cir. 2002); *Shoshone-Bannock Tribes of the Fort Hall Reservation* v. *Dep't of Health & Human Servs.*, 279 F.3d 660, 668 (9th Cir. 2002). The Ninth and Tenth circuits held that the Secretary was excused by the availability clause of section 450j-1(b) from fulfilling his contractual obligation to pay full contract support costs. We find none of the Secretary's arguments persuasive, and disagree

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[5] We reject the government's attempt to distinguish *Blackhawk* on the basis that *Blackhawk* involved the interpretation of a standard procurement contract, rather than a contract under the ISDA. There is nothing in the ISDA to support the contention that the Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors.

with the approaches of the Ninth and Tenth Circuit cases.[6]

We consider separately the Secretary's obligations with respect to "ongoing contracts" and "initial and expanded contracts." "Ongoing contracts" are contracts that continue from fiscal years before the relevant appropriations act, while "initial and expanded contracts" are those that begin during the fiscal year of the relevant appropriations act. *See* Indian Health Service Circular No. 96-04, at 10, 13, available at http://www.ihs.gov/publicinfo/publications/ihsmanual/Circulars/Circ96/9604.pdf.[7]

A. Ongoing Contracts

There is no argument that there was an explicit statutory cap in the appropriations acts for ongoing contracts. However, in various appropriations committee reports, the Senate Appropriations Committee and the House Appropriations Committee recommended particular funding levels for contract support costs for both ongoing and initial and expanded contracts. For example, the House Report on the 1996

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[6] Those cases involved the Shoshone-Bannock Tribe's operation of healthcare programs during fiscal year 1996, the Shoshone Paiute's operation of healthcare programs during fiscal years 1996 and 1997, and the Cherokee Nation's Tribes of the Duck Valley Reservation's operation of healthcare programs during fiscal year 1997. *Shoshone-Bannock*, 279 F.3d at 668; *Cherokee*, 311 F.3d at 1058 n.4.

[7] The status of the contracts at issue here is somewhat unclear. The parties dispute whether some of the programs the appellee operates were "ongoing" or "initial and expanded." (Compare Appellant's Br. at 18, with Appellee's Br. at 21 n.42.) Because we conclude that there was no statutory cap on appropriations for either type of program, we need not decide this issue.

appropriations act stated, "[t]he Committee recommends $153,040,000 for contract support." H. R. Rep. No. 104-173, at 97 (1995). The amount contemplated for ongoing contracts can be deduced by deducting the amount recommended for initial and expanded contracts in this case, $7,500,000. *Id.* Thus, the total contemplated by the House Committee for ongoing contracts in 1996, was $145,540,000. As discussed above, the Supreme Court's decision in *Lincoln*, our predecessor court's decision in *Blackhawk*, and other cases establish that such committee report language as such is not binding on the Secretary. *Lincoln*, 508 U.S. at 192, 113 S. Ct. 2024; *Blackhawk*, 622 F.2d at 547 n.6; *see also Am. Hosp. Ass'n*, 499 U.S. at 616, 111 S. Ct. 1539 (holding that statements in committee reports were not binding on the agency and do not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating").[8]

The Secretary accepts this principle, but argues that he had discretion to determine the amount of "available appropriations" for ongoing contracts and that this discretion was appropriately guided by the recommendations in committee reports. The Tenth Circuit agreed, holding:

> in accordance with the appropriation committee report recommendations, the [Secretary] allocated

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[8] Significantly, the ISDA, in one very limited respect, did make Committee Report language binding, stating that "[t]he amount of funds required by subsection (a) of this section . . . (2) shall not be reduced by the Secretary in subsequent years except pursuant to . . . (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution." 25 U.S.C. § 450j-1(b) (2000).

> to area offices for tribal contract [support costs] $153,040,000 in 1996 and $160,660,000 in 1997 . . . . [W]hile the Tribes correctly argue that the earmark recommendations of a committee are not typically legally binding, the [Secretary] is likewise not obligated to completely ignore them. Nothing suggests that the [Secretary] awarded the amount it did for ongoing program [contract support costs] because it felt *legally* obligated to do so because of the committee report recommendations, as opposed to *making that allocation as an exercise of the limited discretion inevitably vested in it.* In sum, we agree with the district court that funding for the Tribes' ongoing [contract support costs] was subject to the availability of appropriations from Congress, and there were insufficient appropriations to fully pay those [contract support costs].

Cherokee, 311 F.3d at 1062-63 (first emphasis in original) (second emphasis added) (internal citations omitted).[9]

We cannot agree that the Secretary had discretion to refuse to reprogram to meet his contractual obligations. As we have discussed above, it is well recognized that if the Secretary has the authority to reprogram and there are funds available in a lump-sum appropriation, there are "available funds." Our predecessor court in *Blackhawk* rejected the Secretary's contention to the contrary. 622 F.2d at 547. In *Blackhawk*, the government refused to reprogram to meet its obligations under a

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[9] In the Ninth Circuit, the parties agreed that only the transitional costs of new and expanded contracts were at issue. *Shoshone-Bannock*, 279 F.3d at 666. Thus, funding for ongoing contracts was not addressed in that case.

settlement agreement, because members of Congress had expressed their disapproval of the reprogramming procedure in committee reports and during hearings. *Id.* at 544-46. Our predecessor court held that statements of Congress that were not enacted into legislation, "can have no bearing upon the parties' rights and obligations under the settlement agreement." *Id.* at 552.

Indeed, allowing the Secretary such discretion would be directly contrary to the purpose of the 1988 Amendments. The primary purpose of section 205 was to remedy "[t]he consistent failure of federal agencies to fully fund tribal indirect costs." S. Rep. No. 100-274, at 8-9. Under the Secretary's approach, section 205 of the 1988 amendments would be rendered a nullity. See *Holloway* v. *United States*, 526 U.S. 1, 9, 119 S. Ct. 966, 143 L. Ed. 2d 1 (1999) (rejecting a statutory construction that "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit").[10]

In short, non-binding recommendations of Congress do not excuse the Secretary from fulfilling his duty under the contracts at issue here to pay full contract

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[10] Significantly, in *Ramah Navajo School Board, Inc.* v. *Babbitt*, the District of Columbia Circuit also rejected the Secretary's argument that he had "nearly limitless discretion" under the ISDA to pay less than the full amount of contract support costs that were made available in the relevant appropriations acts. 87 F.3d 1338, 1345 (D.C. Cir. 1996). After analyzing the text and legislative history of the ISDA, the court in *Ramah Navajo* held that "Congress left the Secretary with as little discretion as feasible in the allocation of [contract support costs]" and that "there is overwhelming evidence that Congress intended the ISDA to limit the Secretary's discretion in funding matters." *Id.* at 1344, 1347.

support costs. The Secretary did not have the discretion to breach his contracts with the appellee.[11]

B. Initial and Expanded Contracts

The Secretary appears to argue, however, that even if there were available funds with regard to ongoing contracts, there was a statutory cap on "initial or expanded contracts," which limited the amount of available funds for initial and expanded contracts and excused the Secretary's duty to pay full contract support costs for those contracts. The appropriations acts at issue here all grant a lump-sum appropriation to the Indian Health Service and do not include "not to exceed" language. But these acts do include a provision stating that, "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-189 (1996); *see also* Department of the Interior and Related Agencies Appropriations Act, 1995, Pub.L. No. 103-332, 108 Stat. 2499, 2528 (1994); Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993).[12] Initially, it appeared that the Secretary had abandoned the argument that the "shall remain available" language constituted a statutory cap. In his brief, the

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[11] This holding with respect to the Secretary's lack of discretion applies to initial and expanded contracts as well as ongoing contracts.

[12] The parties apparently do not dispute that this $7.5 million was spent during the relevant fiscal years and was insufficient to pay all contract support costs.

Secretary conceded that "[u]nlike the [Bureau of Indian Affairs], [the Indian Health Service's] annual appropriation acts did not place such a cap." (Appellant's Br. at 33.) The Secretary made the further concession that "[i]n order to be a statutory 'cap,' the language would have to read that 'not to exceed' $7.5 million was available for new [contract support costs], rather than that $7.5 million 'shall remain available.'" (Appellant's Br. at 33, n.17 (citing *Ramah Navajo Sch. Bd.*, 87 F.3d at 1342)). At oral argument, the Secretary presented directly inconsistent theories, at one and the same time reiterating the concessions in his brief,[13] and then arguing that there was an explicit statutory cap.[14] We treat the Secretary as making this argument, but con-

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[13] The following exchange occurred at oral argument:

THE COURT: Do I understand that the [Secretary] concedes that there's no legal restriction on [the Secretary] using reprogramming authority to spend more funds for the support costs than it elected to do?

COUNSEL FOR THE SECRETARY: Well, our position is that under the statutory language as it existed, there's, in the appropriations language, there was no statutory cap as that term of art is used.

[14] The following exchange occurred at oral argument:

THE COURT: Are you arguing that there's a cap or not a cap? I'm confused. I thought you began the argument by saying there wasn't a cap?

COUNSEL FOR THE SECRETARY: I'm sorry that I confused the court because our position is that what in effect happened was that Congress clarified it and intended it to be a cap.

THE COURT: Is there a cap or isn't there a cap? Is there a statutory cap?

COUNSEL FOR THE SECRETARY: Yes.

clude that the appropriations legislation did not impose a statutory cap as to initial and expanded contracts.

In the Ninth and Tenth Circuits, the Secretary argued that the "shall remain available" language was ambiguous, and that committee reports should be consulted to resolve the ambiguity. Those courts agreed. In *Shoshone-Bannock*, the court found, "[t]he appropriation language is arguably ambiguous. The language, $7.5 million 'shall remain available until expended' is not an unambiguous cap, as was the 'of which not to exceed' language of [the 1995 appropriations provision at issue in *Oglala Sioux*]." 279 F.3d at 666. The court held, however, that the committee report of the House Appropriations Committee helped to resolve this ambiguity in favor of finding a limitation. The committee report stated, "[t]he Committee has provided $7,500,000 for the Indian Self-Determination Fund. These funds are to be used for new and expanded contracts." H. R. Rep. No. 104-173, at 97. The court held that "[t]his Committee Report language lends itself to the . . . reading [ ] that only $7.5 million is available." *Shoshone-Bannock*, 279 F.3d at 666. In *Cherokee*, the Tenth Circuit agreed with the Ninth Circuit's reasoning in *Shoshone-Bannock* and with the Ninth Circuit's conclusion that there was a $7.5 million cap on contract support costs for new and expanded contracts. 311 F.3d at 1063-64. In *Cherokee*, the Tenth Circuit held, "to the extent there is any indicia of Congressional intent . . . in the appropriations committee report . . . it supports the conclusion that Congress intended the $7.5 million to be the maximum [for new and expanded contracts]." *Id.* at 1065 n.10.

We conclude that the Ninth and Tenth Circuit decisions were incorrect in this respect. We recognize

that where appropriations acts are ambiguous, legislative history can be relied upon to resolve that ambiguity. *See Dickerson*, 310 U.S. at 561, 60 S. Ct. 1034. However, the "shall remain available" language was not ambiguous. Such language is commonly understood as a carryover provision, not a statutory cap. The phrase "shall remain available" is a term of art in appropriations legislation that our sister circuits have consistently interpreted, not as a statutory cap on funding to a particular source, but as an authorization of "carryover authority," indicating that unexpended funds "shall remain available" for the same purpose during the succeeding fiscal year. *See, e.g., Mass. Dep't of Educ.* v. *United States Dep't of Educ.*, 837 F.2d 536, 538-39 (1st Cir. 1988) (interpreting "shall remain available" language in 20 U.S.C. § 1225(b)(1) as preserving unexpended funds to state agencies for obligation and expenditure during the succeeding fiscal year); *Wilson* v. *Watt*, 703 F.2d 395, 400 (9th Cir. 1983) (holding that because the relevant appropriations act provided that unexpended funds "shall remain available," plaintiffs could demonstrate that Congress intended unexpended funds to be used for the same purpose in the succeeding fiscal year); *Nat'l Ass'n of Reg'l Councils*, 564 F.2d at 589 n.12 (distinguishing "shall remain available" language from "not to exceed" language and finding that the former does not impose a statutory cap, but is typically used to "carryover" unexpended funds to the succeeding fiscal year). In the present case, there is no indication that the "shall remain available" language constituted anything other than a typical "carryover" provision. It certainly did not constitute a statutory cap

excusing the Secretary from fulfilling his obligations under the availability clause of section 450j-1(b).[15]

C. Section 314

The Secretary additionally argues that section 314 of the 1999 appropriations act leads to a different result, both with respect to ongoing and initial contracts. Section 314 provided, in relevant part, as follows:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes. . . .

Pub.L. No. 105-277, 112 Stat. at 2681-288. In view of the well-established presumption against retroactivity, the Secretary does not directly argue that section 314 retroactively limits the amount of funds available in the earlier years.[16]

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[15] Because we conclude that the "shall remain available" language was not ambiguous, we need not address what role, if any, the Indian canon of statutory construction, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93-94, 122 S. Ct. 528, 151 L.Ed.2d 474 (2001), or the *Chevron* doctrine, *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), would have here.

[16] See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 309, 311, 114 S. Ct. 1510, 128 L.Ed.2d 274 (1994); *Bradley* v. *Sch. Bd. of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974); *Thorpe* v. *Hous. Auth. of Durham*, 393 U.S. 268, 282, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969).

Nor could the Secretary so argue. Our predecessor court's decision in *Blackhawk* is directly on point. There, the court concluded that a statute enacted by Congress limiting the amount of settlements could not abrogate the contractor's right to payments that were due before the passage of the statute. *Blackhawk*, 622 F.2d at 552; *see also N.Y. Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 369 F.2d 743, 750 (1966) ("[A] pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation.") (*quoting Gibney* v. United States, 114 Ct. Cl. 38, 50-51 (1949)). In the present case, the appellee's right to the contract support costs vested long before the passage of the 1999 appropriations act. The relevant appropriations acts provided that "funds made available to tribes and tribal organizations through contracts . . . shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation." Pub. L. No. 103-138, 107 Stat. at 1408; *see also* Pub. L. No. 103-332, 108 Stat. at 2528; Pub. L. No. 104-134, 110 Stat. at 1321-189.[17]

The Secretary, nonetheless, argues that section 314 acts as an interpretive guide that clarifies Congress's intent to limit available appropriations under the ISDA to amounts earmarked in committee reports. (Appel-

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[17] However, *Blackhawk* holds that a restriction in later appropriations legislation is effective to eliminate the obligation to make a payment due after the passage of the restriction. 622 F.2d at 552. Here, the payments were due before the enactment of section 314. Thus, we need not decide whether that aspect of *Blackhawk* survives the decision in *United States* v. *Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).

lant's Br. at 44, 51.) Again, the Ninth and Tenth Circuits agreed with this argument. In *Cherokee*, the Tenth Circuit held as follows:

> The government argues we need not consider § 314 as a retroactive law; rather, it simply clarifies what Congress meant in enacting the 1996 and 1997 Appropriations Acts. . . . Whether we view [section 314] as a retroactive law, or as merely a clarification of the prior Appropriations Acts, Congress could not have been clearer as to its intent that the Act have a retroactive effect. . . . We therefore agree with the district court that § 314 supports its conclusion that Congress intended to make available for [contract support costs] for new and expanded contracts in fiscal years 1996 and 1997 *only* $7.5 million. Further, it indicated that the earmarked amounts in the committee reports for ongoing [contract support costs] were intended to be legally binding.

311 F.3d at 1065 (emphasis in original); *see also Shoshone-Bannock*, 279 F.3d at 666. We again disagree.

There appears to be some confusion as to the role of later statutes in interpreting earlier ones.[18] We need

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[18] Compare *O'Gilvie* v. *United States*, 519 U.S. 79, 90, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."), and *United States* v. *Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."), *with Bell* v. *New Jersey*, 461 U.S. 773, 784, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983) ("Of course, the view of a later Congress does not establish definitely the meaning of an earlier enactment, but it does have persuasive value."); *Red Lion Broad. Co.* v. *Fed. Communications*

not in this case broadly address or resolve this conflict, because there appears to be general agreement that a later statute cannot be read as clarifying the meaning of an earlier statute where the earlier statute is unambiguous and the later statute is ambiguous. *See Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980) ("[T]he views of subsequent Congresses cannot override the unmistakable intent of the enacting one. . . ."); *Piamba Cortes*, 177 F.3d at 1283-84; *Beverly Cmty. Hosp. Ass'n*, 132 F.3d at 1266. As we have already discussed, in the present case the relevant appropriations acts were not ambiguous and were not in need of clarification. They imposed no cap on available appropriations, either as to ongoing contracts, or as to initial and expanded contracts.

We also agree with the Board that section 314 was not unambiguously intended to clarify the meaning of the prior appropriations acts. As the Board found, section 314 is easily susceptible to an interpretation that Congress was merely prohibiting the *future* obligation of unspent appropriated funds, rather than clarifying that the earlier statutes imposed a statutory

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*Comm'n*, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1968) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Piamba Cortes* v. *Am. Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999) (holding that in some circumstances a statute can be read to clarify an earlier ambiguous statute, such that "concerns about retroactive application are not implicated"), *and Beverly Cmty. Hosp. Ass'n* v. *Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997) ("[C]ongressional legislation that thus expresses the intent of an earlier statute must be accorded great weight" in interpreting the earlier statute, even where the later statute's "retroactive application would pose a series of potential constitutional problems.").

cap. *See Cherokee I*, 99-2 B.C.A. (CCH) at 150,494, 1999 WL 440045. Under these circumstances, section 314 cannot work a supposed clarification of the earlier appropriations acts.

The Secretary offers two final arguments with respect to the effect of section 314. The Secretary argues that the claim for damages is moot, because the case was filed after the close of the relevant fiscal years, and section 314 barred payment after the close of the fiscal years. The issue in this case under the availability clause, however, is whether funds *were* available for the Secretary to meet his contract obligations, not whether those funds *remain available* now. The courts have long entertained breach of contract claims against the government filed after the relevant fiscal years have expired. In such a case, damages are awarded from the judgment fund created by 31 U.S.C. § 1304. *Lee* v. *United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997).

Somewhat inconsistently with his concession that section 314 is not retroactive, the Secretary argues that section 314 retroactively extinguished appellee's right to full contract support costs and thus barred an award of damages from the judgment fund. In *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990), the Supreme Court held that "funds may be paid out [of the judgment fund] only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Id.* at 432. The Secretary urges that in light of section 314, there is no longer a "right to those payments under the terms of a specific statute within the meaning of *Richmond*." (Appellant's Br. at 54.) We have already concluded, however, that section 314 did not impose a retroactive cap on available appro-

priations and did not extinguish the appellee's substantive right to full contract support costs under the express terms of the ISDA. Damages for breach of contract may be awarded out of the Judgment Fund when payment is not otherwise provided for. *Lee*, 129 F.3d at 1484.

In summary, because there were no statutory caps on available appropriations, the Secretary was not excused from meeting his contractual obligations by the availability clause of section 450j-1(b).

III

The Secretary argues alternatively that he was excused from performing his contract obligations by the clause in section 450j-1(b) providing that, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." 25 U.S.C. § 450j-1(b) (2000). The parties disagree as to the meaning of this clause. The tribe urges that the only funds restricted by this provision are those funds specifically appropriated by Congress for other tribal purposes. (Appellee's Br. at 51.) The Secretary argues that the restriction applies as well to funds that the Secretary in his discretion has allocated to other tribal programs. (Appellant's Br. at 36-38.) We need not resolve this dispute, for even adopting the Secretary's construction, there are substantial funds that were not so restricted.

After oral argument in this case, we twice ordered supplemental briefing, in order to seek clarification from the Secretary as to how much of the lump-sum appropriations were obligated to programs serving other tribes for purposes of section 450j-1(b). The

Secretary's filings were unresponsive. We need not decide, however, precisely how much money was obligated to "funding for programs, projects, or activities serving [another] tribe" and, therefore, unavailable for contract support costs, because the Secretary identified two categories of funds that clearly do not fall under this restriction: moneys reserved for "inherently federal functions" and moneys that were left-over and unexpended at the end of the relevant fiscal years. These amounts were more than sufficient during the relevant fiscal years for the Secretary to pay full contract support costs to the tribe, and the Secretary would not, therefore, have been forced to reduce funding for programs serving other tribes in order to meet his obligations.

In fiscal years 1994, 1995, and 1996, Congress's total lump-sum appropriations for Indian Health Services were $1,645,877,000, Pub. L. No. 103-138, 107 Stat. at 1408, $1,713,052,000, Pub. L. No. 103-332, 108 Stat. at 2528, and $1,747,842,000, Pub. L. No. 104-134, 110 Stat. at 1321-189. Out of these lump-sum appropriations, Congress specifically obligated particular amounts to various programs in the appropriations acts themselves, such that the Secretary admits that the remaining available appropriations were $1,288,529,000 for 1994, $1,337,042,218 for 1995, and $1,375,245,000 for 1996. (Appellant's Revised Supplemental Br. at 7.) The Secretary admits that he retained the following amounts for "inherently federal functions": $25,522,460 in 1994, $29,613,574 in 1995, and $35,989,621 in 1996. (*Id.* at 8.) These amounts did not constitute "funding for programs, projects, or activities serving a tribe" under section 450j-1(b). The ISDA is clear that contract support costs "shall not be reduced by the Secre-

tary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring." 25 U.S.C. § 450j-1(b)(3) (2000). The Act also provides that contract support costs "shall not be reduced to make funding available for contract monitoring or administration by the Secretary." *Id.* § 450j-1(b)(1). The statute thus makes it quite clear that funds devoted by the Secretary to "inherently federal functions" were not unavailable for contract support costs. Hence, the Secretary was obligated to reprogram these funds in order to pay contract support costs.

The Secretary also admits that "there were unobligated balances . . . during each fiscal year . . . ranging between $1.2 and $6.8 million." (Appellant's Supplemental Br. at 4.)[19] These leftover and unexpended appropriations were also available to the Secretary to meet his contractual obligations and did not constitute funding for programs serving other tribes.

Taken together, the appropriations reserved for "inherently federal functions" and the left-over appropriations were more than sufficient to pay the tribe its full contract support costs. There is, therefore, no need for a remand, as the Secretary urges, to determine what other funds may have been available for the Secretary to meet his contract obligations. The funds reserved for "inherently federal functions" and the left-over appropriations were not funds devoted to programs serving other tribes, and the Secretary could have drawn from

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[19] The appellee claims that the left-over unobligated amounts were substantially larger (Appellee's Br. at 17.)

those funds to meet his obligations without reducing funding for programs serving other tribes.

Thus, we hold that the Board was correct in holding that the Secretary was not excused from meeting his contractual obligation to pay the appellee its full contract support costs by the clause in section 450j-1(b) providing that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter."

IV

Finally, the Secretary argues that the Board's award of damages to the appellee violated the Appropriations Clause of the Constitution. This argument is untenable.

The Appropriations Clause provides, in pertinent part, as follows: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. Const. art. I, § 9, cl. 7. The Secretary repeats his arguments that no appropriations were made for contract support costs in excess of those recommended in the committee reports, and that, therefore, the award of damages in this case violates the Appropriations Clause. We have already rejected these arguments. It is true that if an agency, "in the absence of statutory authority, make[s] promises that impose an obligation on the federal Treasury, [it] exceed[s] [its] constitutional authority and abrogate[s] Congress' authority under the Appropriations Clause." *Schism* v. *United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (*en banc* ), *cert. denied*, —— U.S. ——, 123 S. Ct. 2246, 156 L. Ed. 2d 125 (2003). However, in this case, there was statutory authority for the contract support costs. The Secretary was authorized by Congress to

make a contract with the appellee and was required to pay the appellee full contract support costs under the ISDA. Congress then granted the Secretary a lump-sum appropriation with no statutory caps imposed, out of which he was entitled to draw money to meet his contractual obligations. There was, therefore, no violation of the Appropriations Clause.

*CONCLUSION*

For the foregoing reasons, we hold that the Secretary was obligated to pay the appellee its full support costs and that the Secretary's failure to do so was a breach of contract. Accordingly, the judgment of the Interior Board of Contract Appeals is

*AFFIRMED.*

COSTS

No costs.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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No. 02-1286

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

CHEROKEE NATION OF OKLAHOMA, APPELLEE

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[Filed: September 12, 2003]

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**ORDER**

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 19, 2003.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: September 12, 2003

cc: Jeffrica J. Lee
Lloyd B. Miller
M. Gross, M. Schmidt, S. Settles

HHS V CHEROKEE NATION OF OKLAHOMA, 02-1286
(BCA - 3877-3879/98)

**APPENDIX C**

[SEAL OMITTED]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

November 15, 2001

APPEALS OF CHEROKEE NATION OF OKLAHOMA

Compact No. 60G 930002-01-18: IBCA 3877-3879/98
HHS Indian Health Service

APPEARANCE FOR APPELLANT: Lloyd Benton Miller, Esq.
James E. Glaze, Esq.
Sonosky, Chambers, Sachse, et al.
Anchorage, Alaska

APPEARANCE FOR GOVERNMENT: Jocelyn S. Beer, Esq.
Duke McCloud, Esq.
Government Counsel
Rockville, Maryland

ORDER ACCEPTING THE PARTIES' JOINT STIPULATION ON QUANTUM

The above appeals were received by the Board and docketed on February 11, 1998. Appellant's Complaint was received on April 20, and the Government's Answer on June 18, 1998. Hundreds of hours of legal

time have been spent on these appeals during the intervening nearly four years. The Board issued its decision in favor of Appellant on June 30, 1999, 33 IBCA 1, 99-2 BCA 30,462, remanding the matter to the parties to ascertain quantum and to report back to the Board within 60 days. On August 12, however, the Government notified the Board that it intended to appeal the decision to the Federal Circuit and that the parties had agreed to defer their quantum negotiations until the Court had issued its decision.

However, on February 25, 2000, the Federal Circuit, by Order, dismissed the appeal as premature on the ground that it was not final and therefore not ripe for appeal (Fed. Cir. No. 00-1056, unpublished). On March 27, the Government moved for reconsideration of the Board's entitlement decision, although the parties continued their quantum negotiations. On October 31, the Board granted reconsideration, with final briefs due by January 15, 2001. On March 16, the Board rejected a request for further briefs, and on March 21, 2001, it issued its decision on reconsideration affirming its earlier decision.

On May 9, 2001, Appellant suggested the appointment of a settlement judge, and Judge Candida S. Steel accepted that assignment. Further meetings were held, and on November 9, during a mediation with Judge Steel, the parties entered into a Joint Stipulation on Quantum, which provided that:

1. Damages to be awarded in favor of the Appellant on its Contract Disputes Act claim filed September 30, 1996, shall be $8,500,000, plus interest from September 30, 1996, to the date of payment pursuant to 41 U.S.C. § 611 of the Contract Disputes Act.

2. The claim filed September 30, 1996, at issue in this appeal did not include any claim for damages arising out of any alleged miscalculation of indirect contract support costs, as addressed by the Tenth Circuit in *Ramah Navajo Chapter* v. *Babbitt*, 112 F.3d 1455 (10th Cir. 1997).

3. By this stipulation all outstanding matters in this appeal have been resolved.

The Board accepts this Stipulation as fully responsive to its original remand of June 30, 1999, and certifies that this matter is now final for appeal to the Federal Circuit at the discretion of the parties.

/s/ BERNARD V. PARRETTE
BERNARD V. PARRETTE
Acting Chief Administrative Judge

I concur:

/s/ CANDIDA S. STEEL
CANDIDA S. STEEL
Administrative Judge

INTERIOR BOARD OF CONTRACT APPEALS

IBCA Nos. 3877-98 through 3879-98

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APPEAL OF CHEROKEE NATION,
P.O. BOX 948, TAHLEQUAH, OKLAHOMA 74465-0948,
APPELLANT

*v.*

U.S. DEPARTMENT OF HEALTH AND HUMAN
SERVICES (INDIAN HEALTH SERVICE), APPELLEE

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[Filed: Nov. 13, 2001]

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**JOINT STIPULATION ON QUANTUM**

The Board having determined the government's liability by Order entered June 30, 1999, affirmed on reconsideration by Order entered March 21, 2001, and the parties having subsequently engaged in mediation with Judge Candida Steel on quantum issues pursuant to Judge Bernard Parrette's referral of May 9, 2001, the parties hereby stipulate as follows:

1. Damages to be awarded in favor of the Appellant on its Contract Disputes Act claim filed September 30, 1996 shall be $8,500,000, plus interest from September 30, 1996, to the date of payment pursuant to 41 U.S.C. § 611 of the Contract Disputes Act.

2. The claim filed September 30, 1996 at issue in this appeal did not include any claim for damages arising out of any alleged miscalculation of indirect contract sup-

port costs, as addressed by the Tenth Circuit in *Ramah Navajo Chapter* v. *Babbitt*, 112 F.3d 1455 (10th Cir. 1997).

3. By this stipulation all outstanding matters on this appeal have been resolved.

Respectfully submitted this 9th day of November 2001.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: LLOYD BENTON MILLER
LLOYD BENTON MILLER

U.S. DEPT. OF HEALTH &
HUMAN SERVICES
Office of General Counsel
Public Health Service

By: JOCELYN S. BEER
JOCELYN S. BEER

**APPENDIX D**

[SEAL OMITTED]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

APPEALS OF CHEROKEE NATION OF OKLAHOMA

IBCA 3877-3879-98 Decided: March 21, 2001

| | | |
|---|---|---|
| Compact No. 60G 930002-01-18 | : | *On Reconsideration* |
| | : | Appellant's Motion for |
| Department of Health and | : | Summary Judgment |
| Human Services | : | Granted; Government's |
| Indian Health Service | : | Motion to Dismiss |
| | : | Denied |

APPEARANCE FOR APPELLANT:

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Sonosky, Chambers, Sachse,
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APPEARANCE FOR GOVERNMENT:

Jocelyn S. Beer, Esq.
Duke D. McCloud, Esq.
Government Counsel
Rockville, Maryland

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

*Background*

On June 30, 1999, based on our decisions in *Alamo Navajo School Board, Inc.* and *Miccosukee Corporation*, IBCA 3463-66 and 3560-62, 98-2 BCA ¶ 29,831, *aff'd on recon.*, 98-2 BCA 29,832, the Board granted a motion by Cherokee Nation of Oklahoma (Cherokee or Appellant) for summary judgment as to the Indian Health Service's (IHS or Government) liability for the full amount of Contract Support Costs (CSCs) to which Appellant was entitled for fiscal years (FYs) 1994, '95, and '96, under the Indian Self-Determination Act (ISDA), despite shortfalls in Congressional appropriations in those years with respect to IHS' overall programs. *Cherokee Nation of Oklahoma*, IBCA 3877-79, 99-2 BCA ¶ 30,462.

*Alamo* and *Miccosukee* had previously been consolidated by the Board on its own motion because of an apparent similarity of issues with respect to the authorizing statutes. But on appeal before the Court of Appeals for the Federal Circuit (CAFC), the cases were severed since different funding law issues were involved. *Alamo* was then voluntarily dismissed by the parties, 185 F.3d 880 (Fed. Cir. 1998), and remains good law, but *Miccosukee* was reversed, 217 F.3d 857 (table) (Fed. Cir. 1999), in light of a similar and contemporaneous appropriations law case, *Oglala Sioux Tribal Public Safety Department*, IBCA 3680, 98-2 BCA ¶ 29,833, *rev'd* 194 F.3d 1374 (1999).

In *Oglala*, the CAFC held that because the relevant Appropriations Act expressly provided that CSC funds were subject to a specific statutory ceiling, (a not-to-exceed "earmark"), as well as to specific language in the

authorizing Act making CSC funds subject to the "availability of appropriations," IHS had no obligation to provide full funding of CSCs, despite its contractual obligation otherwise to do so. IHS therefore moved for the Board's reconsideration of the present appeal arguing that it, too, was governed by the CAFC's decision in *Oglala*. Appellant opposed the motion on the ground that the question at issue was more similar to *Alamo* than to *Oglala* or *Miccosukee* because no statutory cap or restriction existed; but reconsideration of *Cherokee* was nevertheless granted in a decision by this Board on October 31, 2000, 34 IBCA 40, 01-1 BCA ¶ 31,158, Judge Parrette concurring in the result only.

*Applicable Law* (Indian Self Determination Act)

25 U.S.C. § 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided * * *

(2) There *shall* be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs of activities *which must be carried on by a tribal organization as contractor to ensure compliance with the terms of the contract* * * *

(b) Reductions and increases in amount of funds provided. The amount of funds required by subsection (a) of this section * * *

(2) *shall not be reduced* by the Secretary in subsequent years *except pursuant to*—

(A) *a reduction in appropriations from the previous fiscal year* for the program or function to be contracted;
* * *

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe or tribal organization under this subchapter. (Emphasis added.)

**DISCUSSION**

It was primarily because IHS was "asserting errors of law due to the Federal Circuit's reversal of *Miccosukee* and *Oglala*," 34 IBCA 46, 01-1 BCA ¶ 31,158 at 153,906, that we granted the reconsideration. The principal error of law asserted by IHS was that for FYs 1990-94, contrary to the Board's understanding, the Tribally Controlled Schools Act (TCSA), 25 U.S.C. § 2008, did not condition the issuance of grants upon the availability of appropriations, and that the Congress did not add such a proviso until after the end of FY 1994. Therefore, IHS asserted, *Cherokee* differed from *Alamo* (on which the Board had relied) because in this case there was such a limitation. In fact, however, the Board was correct in stating that the TCSA has had a provision virtually identical to that of the ISDA since 1988. Thus, the primary issue on reconsideration is simply whether the Board's decision in *Cherokee* was implicitly overturned by *Oglala*.

IHS's position before *Cherokee* was decided was that it was prohibited from paying the full amount of Appellant's CSCs by Section 314 of the Omnibus Appropriations Act for FY 1999 (*See Cherokee*, *supra*, 99-2 BCA ¶ 30,462 at 150,489). However, IHS' present position

largely ignores that earlier contention and bases its arguments primarily on the second proviso contained in the last sentence of subparagraph (b) of 25 U.S.C. § 450j-1, dealing with the potential reduction of funds to other tribes and other programs. Many of these programs, however, are clearly discretionary; and, as in *Shoshone-Bannock*, 988 F. Supp. 1306, 1332 (D. Or. 1997) and 999 F. Supp. 1395, 1397 (D. Or. 1998), IHS has provided neither adequate nor convincing proof in this case that any actual reduction of funds for other tribes would be required to fully fund Appellant's CSCs, given IHS' increased appropriations for the years in question.

IHS does not deny that its funds were substantially increased by the Congress during the years in question and does not attempt to rationalize the differences between an unrestricted lump sum appropriation and an appropriation with a statutory earmark, which is the essence of the matter. In effect, IHS is claiming discretionary authority where there is no discretion—i.e., in its obligation to fully fund CSCs to the extent funds are available. *See Ramah Navajo School Board* v. *Babbitt*, 87 F.3d 1338 at 1341 ("In a year in which Congress appropriates sufficient money to cover the Secretary's [CSC] obligations, each tribe is entitled to receive the full amount of its [CSC] funding.") and ("The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSCs]." *Ibid.* at 1344.) (Emphasis in original.)

In its effort to justify its allocation decisions by subparagraph 450j-1(b), dealing with the funding of other programs, IHS is attempting to assert the

existence of additional mandatory requirements, even though the authorizing Act clearly permits the exercise of discretion to fund or not fund many of these other activities. Such a discretionary use of funds cannot excuse the Secretary's failure to comply fully with the mandatory requirements of § 450j-1(a)(2).

As discussed in our prior decision in this case, the payment of CSCs is clearly mandatory, subject only to an unrestricted (i.e., lump sum) availability of appropriations. The last-sentence proviso of subsection (b) makes clear that the Secretary is not required to *reduce* his discretionary funding of one tribe for the sake of another one—all of which has nothing to do with his duty to fully fund the mandatory CSC contracts first. Given a lump sum appropriation, as existed here, the Secretary has a clear duty to pay CSCs in full as the authorizing Act directs. There is no discretion under the authorizing Act to withhold or reduce mandatory funds to meet other, discretionary, needs. *Ramah*, *supra*.

As to the legal availability of unrestricted or uncapped appropriations, "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without *statutorily* restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency" (citing cases; emphasis added). *Lincoln* v. *Vigil*, 113 S. Ct. 2024 at 2031 (1993). The Court also notes that: "Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress."

IHS therefore cannot place its reliance on informal limitations in Committee report language. What is controlling is whether the appropriations as enacted were or were not subject to statutory restrictions, and in this case they were not. They were unearmarked, uncapped, lump sum, increased-amount appropriations. Therefore, adequate funds were readily available for CSC distribution, and the Cherokee Nation is entitled to its full contractual share. *Alamo*, *supra*; *Ramah*, *supra*.

*Decision*

Accordingly, we see no need for further briefs or for a further evidentiary hearing in this appeal. We believe that our opinion in *Cherokee* was correct as originally issued and, upon reconsideration, we decline to modify that decision.

/s/ BERNARD V. PARRETTE
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ CANDIDA S. STEEL
CANDIDA S. STEEL
Administrative Judge

**APPENDIX E**

[SEAL OMITTED]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

APPEALS OF CHEROKEE NATION OF OKLAHOMA

IBCA 3877-3879/98 — Decided: June 30, 1999

| | | |
|---|---|---|
| Compact No. 60G 930002-01-18 Department of Health and Human Services: Indian Health Service | : | Appellant's Motion for Summary Judgment Granted; Government's Motion to Dismiss Denied |

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* * * * *

These appeals by the Cherokee Nation of Oklahoma (Cherokee or the Tribe), a Federally recognized Indian tribe, seek additional contract support costs (CSC) from

tribe, seek additional contract support costs (CSC) from the Indian Health Service (IHS) of the Department of Health and Human Services (HHS) to help defray the indirect costs of the Tribe's ongoing health programs for fiscal years (FY's) 1994, 1995, and 1996. But for a recently enacted restriction in the Department's 1999 Appropriation Act, the appeals are factually similar to, and legally almost indistinguishable from, those decided by the Board adversely to the Government less than 2 years ago in *Alamo Navajo School Board, Inc., and Miccosukee Corporation*, Bureau of Indian Affairs (BIA), U.S. Department of the Interior, IBCA 3463-3466 and IBCA 3560-3562 (*Alamo*), 98-2 BCA 25, 831 and 29,832.

Although the Government appealed our *Alamo* decision to the Court of Appeals for the Federal Circuit, *sub nom. Babbitt* v. *Miccosukee Corporation*, 98-1457, and *Babbitt* v. *Alamo Navajo School Board*, 99-1129—and the latter appeal was subsequently dismissed at the behest of the parties—no decision has yet been issued on the merits of the *Miccosukee* appeal; and we do not presume to speculate about what the Court will decide or on when its decision will be issued.

The present case entails some differences from *Alamo*, in that it involves HHS and IHS rather than the U.S. Department of the Interior and BIA. It involves a compact under Title III (known as the Tribal Self-Governance Demonstration Project Act of 1988, or "Title III") of the Indian Self-Determination and Education Assistance Act (ISDA) rather than a contract alone; and it involves three unrestricted lump-sum annual IHS appropriations to carry out the program, but with accompanying Committee Report language stating only $7.5 million was intended to be available

for contracts and compacts, an amount which IHS duly spent.

Finally, the case also now involves a provision, enacted as section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, H.R. 4328, Pub. L. No. 105-277 (section 314; FY 1999 Act), that arguably was designed to prevent any further CSC payments to Indian Tribes for FY's 1994 through 1998. The Government asserts that this provision prevents us from granting any monetary relief to the Tribe in these appeals.

The Government has moved to dismiss the appeals on the basis of section 314, and Cherokee has countered with its own motion for summary judgment. Briefs were filed by both sides, and oral argument was held on April 15, 1999. The parties decided not to have a court reporter present at the argument and not to submit post-argument briefs. On its own volition, the Board will bifurcate these appeals, and our decision addresses only entitlement and not quantum.

*Factual Background*

For 15 years, the Cherokee Nation has been operating various IHS health care programs under Title I of the ISDA, 25 U.S.C. §§ 450-450n (1994). Since the beginning of FY 1994, however, it has operated them pursuant to a "Compact," which was entered into between the Tribe and IHS on June 30, 1993, augmented by "Annual Funding Agreements" (AFA's), all under Title III of the ISDA, a demonstration project that was added to the ISDA by section 209 of the Act's 1988 Amendments, Pub. L. No. 100-472, 102 Stat. 2296, 25 U.S.C. § 450f note (1994).

Section 303(a)(6) of Title III is similar to the provision for self-determination contracts in 25 U.S.C. § 450j-1 (1994). It requires the Secretary of HHS to pay a tribe participating in a compact an amount equal to that which the tribe would have been eligible to receive under contracts or grants under Title I of the ISDA, including direct program costs and indirect costs. This basic funding is called the "Secretarial amount."

Title I of the ISDA, 25 U.S.C. §§ 450j-1(a)(2), (3), and (5) (1994), also requires the Secretary to pay a contracting tribe various categories of CSC. Costs paid by IHS to tribes participating in the Title I contracting program or the Title III "self-governance program" include (1) indirect costs to share the administrative overhead costs associated with the IHS programs under a tribal contract or self-governance compact; (2) certain direct costs; and (3) nonrecurring or one-time start-up costs associated with the initial transfer of an IHS program to tribal operation.

U.S. Department of the Interior's Office of the Inspector General determines the indirect cost rate for the Cherokee Nation's Compact and AFA's with IHS. Under these AFA's, an indirect cost rate is negotiated and determined pursuant to OMB Circular A-87 and other applicable Federal law and is applied to the total direct costs of the program involved. Cherokee's indirect cost rate was 14.3 percent for FY 1994, 17.1 percent for FY 1995, and 12.2 percent for FY 1996. Both by statute and as specified in the AFA's these payments were made subject to the availability of appropriations, and the AFA's themselves were subject to a retroactive rate adjustment after all of the necessary information, such as the amounts available for

direct funding, was known. The FY 1994 AFA provided:

> Section 6—Indirect Cost Funding. The amount of funds allocated to the Cherokee Nation under this annual funding agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated for the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose.

In section 2 of the first Addendum to the FY 1994 AFA, for example, the parties agreed to add $2.3 million for the transfer to the Tribes of certain functions of the IHS Oklahoma area office and IHS headquarters office. They further agreed that the Cherokee Nation would receive this sum in FY 1994 "plus the appropriate indirect costs as set forth in section 6 of said FY 1994 Funding Agreement." Part of the amount was to be made immediately available, and the remainder upon enactment of HHS' 1994 appropriations bill. In Addendum No. 5 to the FY 1994 AFA, the parties further agreed that: "Except as expressly modified by this Addendum the parties hereby agree that the provisions of the FY 1994 AFA, as modified or amended by previous Addenda, shall remain unchanged, in full force and effect and shall apply to the additional funding and projects described in this Addendum."

Under section 2 of the FY 1994 AFA, as amended, the Cherokee Nation was paid total funding of $18,377,612 for direct programs. Of this total, $4,084,000 and $2,236,500 represented, respectively, the transfer in FY 1994 from IHS to the Cherokee Nation of the

programs of the Stilwell and Sallisaw clinics. Cherokee claims that these programs should also have received CSC for FY 1994. Specifically, the tribe alleges that it was entitled to receive (1) indirect costs of $2,627,999, based on total program funding of $18,377,612 multiplied by the 14.3 percent agreed upon; (2) recurring CSC of $209,499 (Stilwell) and $163,397 (Sallisaw), for a total of $3,467,580. Of this amount, IHS paid only $1,399,377, leaving an alleged unpaid CSC balance due Cherokee of $2,068,203.

For FY's 1995 and 1996, the Tribe claims comparable amounts for similar reasons under similar AFA provisions, alleging an additional unpaid balance of $3,232,445 for FY 1995 and $1,739,711 for FY 1996. Cherokee alleges that IHS' failure to pay these balances as agreed was both a breach of contract and a violation of the ISDA because IHS had received unrestricted lump-sum appropriations of $1,189 million in FY 1994, $1,277 million in FY 1995, and $1,331 million in FY 1996, amounts that were more than adequate to make full payment. Additional funds were also available because the appropriations in each of these years involved *increases* of $88 million in FY 1994 over FY 1993, $54 million in FY 1995 over FY 1994, and $36 million in FY 1996 over FY 1995. Therefore, Cherokee alleges, based on annual appropriation increases alone, sufficient unrestricted funds were available to IHS to pay Cherokee's full CSC for all 3 years without any adverse effect on other tribes, an issue frequently raised by IHS in its pleadings.

The Government responds that Cherokee has no statutory right to additional funding for CSC. It avers, first, that under the ISDA, the requirement to fund CSC is, notwithstanding any other provision of the Act,

"subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (1994). Thus, the statute does not obligate the Secretary to fund CSC beyond the amount of appropriations *made available for that purpose.* Second, section 314 of the FY 1999 Act establishes the total amounts available for CSC for the FY's in question "notwithstanding any other provision of law." Therefore, the Government contends that, despite what any other law says, this provision extinguishes appellant's claims for more CSC for FY 1994, FY 1995, and FY 1996 "by establishing the total amounts appropriated for those fiscal years under the Appropriations Clause of the United States Constitution." Thus, it contends, even if the facts alleged by the appellant are true, appellant has not stated a claim upon which relief can be granted and the case should be dismissed.

IHS' method of dealing with indirect costs dates back to 1994 when both Appropriation Committees expressed concern over escalating CSC costs. The Senate Committee stated in its report (S. Rep. No. 103-238 at 339) that "for each year since 1988, the requirements of new or expanded Indian Self-Determination contracts have exceeded available funding in this program and have had the effect of causing tribal governments to delay the assumption of the responsibility for administering IHS programs." The Committee suggested that if new contracts were being proposed, IHS should either reduce funding for old contracts or reject the new contracts. The Committee did not suggest using program money for CSC, according to IHS.

However, neither did the Appropriations Committees insert a CSC funding limitation into the Appropriations Act itself before FY 1998. The parties agree that IHS continued to receive a lump-sum appropriation for

FY's 1994-97, with yearly instructions in Committee reports indicating how the money was to be used, and with a total of $7.5 million being allocated for CSC purposes. To implement this nonstatutory instruction (which IHS continually refers to as an "earmark" despite its legal unenforceability; *see* discussion in *Alamo*, 88-2 BCA at 147,686-87), the agency adopted a policy that yearly CSC funding requests in excess of the "earmark" would be placed in a "queue," or ISDA Priority List, and would be paid to each tribe/tribal organization, in turn, as additional CSC funds became available, on a first-come, first-served basis. Thus, tribal requests at the head of the queue would be paid until the $7.5 million for that FY was exhausted.

The government argues that the Cherokee Nation does not have a contractual right to full funding of its CSC. The Compact and subsequent AFA's, it contends, contain no unconditional promise to pay CSC, and the compact and AFA's at issue here incorporated all applicable statutory limitations. As a result, the Secretary's contractual obligation to fund CSC was contingent on the availability of appropriations. The statutory language to the effect that CSC funds "shall" be paid each year at the agreed-upon rate was essentially disregarded on the ground that sufficient appropriated funds were not available for that purpose, based simply on the nonbinding Committee Report instruction.

Moreover, because section 314 establishes the total amounts available for CSC for the FY's in question, and those amounts have long since been expended, the Government argues that it is not obligated to pay any CSC beyond the constraint established by Congress. In the Government's view, section 314 "extinguished" any

obligation for additional funding that it might otherwise have had under our decision in *Alamo*.

*Pertinent Statutory Provisions*

(1) Title III, Tribal Self-Governance Demonstration Project:

> Sec. 303(a): The Secretary is directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government [which]: (1) shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Department of the Interior and the Indian Health Service of the Department of Health and Human Services that are otherwise available to Indian tribes or Indians * * *
>
> (c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretary *shall* provide funding to such tribe to implement the agreement (emphasis added).
>
> (d) For the purpose of section 110 of this Act [Sec. 450m-1], the term "contract" shall also include agreements authorized by this title * * *
>
> (e) To the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.
>
> Sec. 210: Nothing in this Act shall be construed as (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from

suit enjoyed by an Indian tribe; or (2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to Indian people.

(2) 25 U.S.C. § 450j-1 (1994). Contract funding and indirect costs:

(a)(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an annual amount for the reasonable costs for activities which must be carried out by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(a)(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract * * *

(a)(5) Subject to paragraph (6), during the initial year that a self-determination contract is in

effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary (A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and (B) to ensure compliance with the terms of the contract and prudent management.

(b) * * * Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(g) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(3) 25 U.S.C. § 450m-1 (1994). Contract disputes and claims.

(d) The Contract Disputes Act * * * shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals.

(4) Section 314 of the FY 1999 Act:

> Notwithstanding any other provision of law, *amounts appropriated to or earmarked in committee reports* for the Bureau of Indian Affairs and the Indian Health Service by P.L. Nos. 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations *for contract support costs* associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, *are the total amounts available* for FY's 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

(Emphasis added.)

*Legislative History*

Apparently, this case arises because for more than a decade there has been disagreement between the substantive committees and the appropriations committees of the Congress on how much funding Indian programs require and on how the funds should be allocated. The substantive committees have been sympathetic with the need for indirect costs or overhead funding if the tribes are to establish and maintain self-determination and self-governance; whereas, the appropriation committees have tended to emphasize direct program funding at the expense of overhead costs.

Cherokee suggests, however, that IHS is largely responsible for the problems that have arisen, and there is considerable legislative history supporting that view as well. Cherokee asserts (in its Summary Judgment Memorandum at 3-4) that:

> When the ISDEA was first enacted in 1975, Congress delegated broad general authority to the agency to carry out the Act. But the agency's entrenched resistance to the Act prompted Congress to enact comprehensive amendments in 1988 and 1994. Pub. L. 100-472, 102 Stat. 2285 (1988); Pub. L. 103-413, 108 Stat. 4250 (1994); *see also* S. Rep. 100-274 at 8, reprinted at 1987 U.S.C.C.A.N. 2620, 2627; *Ramah Navajo School Board* v. *Babbitt*, 87 F.3d 1338, 1344-45 (D.C. Cir. 1996); *Shoshone-Bannock I*, 988 F. Supp. at 1314-16. The 1988 amendments made full funding mandatory by substituting an entirely new section from the one sentence originally appearing at 25 U.S.C.A. Sec. 450j(h) (1983); 25 U.S.C. Sec. 450j- 1(a)(2),(b), & (c). The 1994 amendments further detailed the types of contract supports costs that must be paid, overruling contrary agency positions. 25 U.S.C. Sec. 450j-1(a)(2), (3), and (5). Together, these and other amendments greatly narrowed—indeed nearly completely revoked—the general discretion Congress had once vested in the Secretary to carry out the ISDEA.

Appellant adds the following footnote to the above-quoted summary:

> The original Act delegated to the Secretary broad rulemaking authority. 25 U.S.C. Sec. 450k(a) (1983). When the IHS and the BIA failed to follow the 1988 Amendments' mandates, Congress in 1994 *revoked*

all delegated authority to write regulations save in sixteen specified areas. 25 U.S.C. Sec. 450k(a)(1). Those areas do not include determining contract support cost funding levels. *See Ramah Navajo School Board*, 87 F.3d at 1450.

It is perhaps worth noting again some oft-quoted passages from the December 1987 Senate Indian Affairs Committee Report accompanying the 1988 ISDA amendments (S. Rep. 100-274, 1987 U.S.C.C.A.N. 2620, 2627-32) cited by Appellant:

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

* * * * *

For several years the Bureau of Indian Affairs and the Indian Health Service have failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts. Consequently, tribes have been forced to request supplemental appropriations directly from Congress to make up the shortfall. The Senate Committee on Appropriations questioned the chronic shortfalls of contract support costs in its report on the Fiscal Year 1984 Appropriations Act for the Department of the Interior and Related Agencies. The Senate (Appropriations) Committee Report stated that:

Contract Support Costs have increased far out of proportion with the rather small increases in total dollar volume of contracts. While the Inspector General is charged with the responsibility for determining "allowable costs" neither the IG nor the BIA make any effort to determine the reasonableness of such costs. The Committee believes that this should be the responsibility of the Bureau. Various options for controlling indirect costs are currently under consideration and the Committee expects a report with recommendations to be included in the submission of the fiscal year 1985 budget which will alter the budget format as indirect costs are to be included in the program accounts rather than as a line item.

The Select Committee on Indian Affairs does not agree with the analysis of this issue presented by the Senate Appropriations Committee. Part of the problem with this view of indirect cost was that the

term "contract support costs" had not been operationally defined. The term has variously meant administrative overhead costs, indirect costs and the incremental costs associated with the management of a new contract. Another aspect of the problem is that the Bureau of Indian Affairs has failed to accurately represent the facts regarding indirect costs, including failing to acknowledge an important study conducted in 1983 by the Department of the Interior Office of Inspector General.

* * * * *

The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian Affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination is essential if the federal policy of Indian Self-Determination is to succeed.

*Discussion*

We have quoted the foregoing Senate Committee Report language at length because we believe it must be taken into account in determining whether, as the Government urges, section 314 has "extinguished" any obligation that IHS might otherwise have to pay the Tribe's indirect costs in arrears for FY's 1994 through 1996. However, before discussing section 314, we must first determine whether the Government would otherwise owe this money to Cherokee.

The simple answer is yes. Apart from section 314, IHS has raised no new issue, invoked no new principle, and asserted no legal argument that the Board did not fully take into consideration when it arrived at its decision in *Alamo*, *supra*, which raised essentially the same issues as those in these appeals. Moreover, every case we know of that has considered these or similar issues, and particularly the issue of whether the language of the ISDA requiring the full payment of indirect costs under self-determination contracts is mandatory when the agency has received sufficient appropriations to do so, has found that full payment is required and that the Secretary has no discretion in the matter. *See e.g.*, *Ramah Navajo School Board, Inc.* v. *Babbitt*, 87 F.2d 1338 (D.C. Cir. 1996); *Ramah Navajo School Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Shoshone-Bannock Tribes of Fort Hall* v. *Shalala*, 988 F. Supp. 1306 (D. Or. 1997) and (on reconsideration) 999 F. Supp. 1395 (D. Or. 1998); *California Rural Indian Health Board* v. *Shalala*, U.S.D.C. No. C-96-3526, slip opinion, August 25, 1998.

The only qualification is that funds must be available; and that issue was put to rest as far as this Board is concerned in *Alamo*. In construing the "subject to the availability of funds" language of the ISDA, the Board relied on case law that dates back to the post-Civil-War period and that remains consistent to the present day, to the effect that, at least when a Government agency has a sufficient unrestricted lump-sum appropriation available to it, it is bound by its contracts to the same extent that a private party would be, and it cannot avoid its obligations because of reduced appropriations in situations where the other party has already performed, *unless* the Congress has made abundantly clear

its intention to repudiate the contract or contracts involved.

Applying the principles of *Alamo* to this case, we conclude that:

> In making allocations and disbursements for indirect costs under compacts and contracts pursuant to Title III, when funded by unrestricted lump-sum appropriations, IHS remains bound by the mandatory language of the authorizing legislation and its agreements with Indian tribes executed pursuant thereto, despite any shortfalls in the total amounts appropriated, because in providing indirect costs under the Act, the Department is performing an essentially ministerial function, and it has no authority to modify administratively the clear statutory mandates giving priority to indirect costs.
>
> Absent a specific revision of the authorizing legislation by either an amendment of the substantive Act, or a clear provision in the applicable appropriation Act, the Department has no authority to modify either the direct cost base (multiplicand) by which an indirect cost rate is to be multiplied or the percentage rate (multiplier) determined by agreement with the Inspector General of the U.S. Department of the Interior.
>
> The qualification in the authorizing Act to the effect that the Indian Tribes' entitlement to full funding of their indirect costs is subject to the availability of appropriations, is not applicable where the current appropriation is in the form of a total lump-sum amount that is sufficient to fully fund such indirect costs, and the then current appropriations

Act lacks any statutory restriction on its use for such purposes.

Although IHS would be bound by specific statutory ceilings and limitations, often referred to as "earmarks," set forth in annual appropriations Acts, it is also bound by the lawful contracts and agreements it has entered into with Indian tribes, particularly when the Tribes have already performed their self-determination functions in reliance upon such agreements.

Even if the precise basis, form, and contents of Indian Self-Determination contracts for indirect costs under Self-Governance Compacts are not expressly prescribed by statute, the Department is just as legally bound by its lawful contracts and agreements as a private contractor would be under similar circumstances. The title of the self-determination Act under which they were entered into is immaterial.

It is now appropriate to consider the effect of section 314, which we again quote in its entirety:

Notwithstanding any other provision of law, *amounts appropriated to or earmarked in committee reports* for the Bureau of Indian Affairs and the Indian Health Services by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations *for contract support costs* associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, *are the total amounts available* for fiscal

> years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

(Emphasis added.)

We first note that this language is merely appropriations Act language as such—that is, it deals simply and solely with funding matters and it is limited to the particular years specifically mentioned. It does not purport in any way to modify the provisions of the ISDA. If it did, such a result would have to be specific, unequivocal, and clearly intended. *TVA* v. *Hill*, 437 U.S. 153, 190 (1977). Nor does the Government suggest otherwise. In its Brief Supporting its Motion to Dismiss, at page 9, the Government states: "Section 314 of the FY 1999 Appropriations Act is not acting as an implied repeal of the provisions requiring CSC. Rather, Section 314 is consistent with section 450j-1(b), which requires that the availability of funding be subject to appropriations notwithstanding any other provision in the Act." Nevertheless, the Government argues that section 314 has the retroactive effect of extinguishing Cherokee's CSC claims.

Cherokee, however, disputes the Government's allegation, pointing out that a retroactive effect "would instantly render illegal" IHS' past, supposedly excess (i.e., in excess of the amounts specified in Appropriation Committee's reports], use of funds from its lump-sum account to pay CSC, since the excess expenditures would violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1994). "Such an interpretation is untenable," Cherokee argues, "in light of the heavy presumption against

implied retroactivity and other rules of statutory construction." Rather, Cherokee urges, what section 314 does is merely to "limit IHS's ability to now use unobligated balances from its prior year lump-sum appropriations to fund unpaid contract support obligations for those years." Moreover, Cherokee says, "this limitation on the agency's current use of such funds has no bearing on its liability for its past failure to meet its contractual obligations." (Cherokee's Opposition to Motion to Dismiss at 28.)

Cherokee further cites *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994) for the rule governing potential retroactive statutes. According to *Landgraf*, if the statute is not clearly retroactive, a determination must be made whether it would impair rights a party possessed when he acted. If so, *Landgraf* says, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. This traditional presumption operates with greatest frequency in cases involving new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance. *Id.* at 270. Further, the legal presumption is very strong that a statute was not meant to act retroactively, and it ought never to receive such a construction if it is susceptible of any other. *USF&G* v. *Struthers Wells*, 209 U.S. 306, 314 (1908), cited in *Kaiser Aluminum* v. *Bonjorno*, 494 U.S. 827, 843-44 (1990).

Finally, Cherokee argues, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," citing

*DeBartolo Corp.* v. *Florida Gulf Coast and Const. Trades Council*, 485 U.S. 568 (1988).

Here, there is no clear indication, and certainly no proof, that the Congress intended either to modify or repeal the CSC mandate of the ISDA or to relieve IHS of its obligation to fully fund CSC for programs already undertaken and completed during the FY's in question. *See, e.g., Lynch* v. *United States*, 292 U.S. 571, 580 (1934) ("To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy but an act of repudiation.")

In addition, as Appellant points out, since the Board's decision in *Alamo* held that an earmark in BIA's current appropriations Act itself was insufficient to extinguish Miccosukee's right to compensation for contractual work already performed (*see* 98-2 BCA 147,688-92), then *a fortiori* an earmark in an appropriations Act years later is insufficient to extinguish rights to compensation for work performed in FY's 1994, 1995, and 1996, unless the Congress' intention to achieve that result is abundantly clear. Here, however, it is equally probable that the Congress was simply prohibiting the future use of unspent appropriated funds for the 5 prior years as a budgetary measure. We therefore conclude that Cherokee's right to full payment of its CSC for those years has not been extinguished and that it is entitled to the unpaid funds.

Where will the funds come from? The Government argues that because section 314 states that "notwithstanding any other provision of law" the amounts previously appropriated or earmarked for CSC are the "total amounts available" for CSC, even the U.S. Treasury's Judgment Fund (31 U.S.C. § 1304 (1994)) is unavailable for the payment of damages to Cherokee.

However, one of the criteria for Judgment Fund use is precisely that the "payment is not otherwise provided for." If we accepted the Government's view, Cherokee would be without a remedy. We do not believe that is what the Congress intended when it enacted the Contract Disputes Act, and we therefore reject the Government's argument.

We also conclude, on the basis of 25 U.S.C. § 450j-1(a)(5) (1994) that Cherokee is entitled to CSC funds for its Stilwell and Sallisaw programs, excluding any funds directly associated with construction projects as prohibited by paragraph (h) of that subsection.

*Decision*

These appeals are appropriate for summary disposition, and Cherokee's motion for summary judgment as to entitlement on all issues is granted. The appeals are hereby remanded to the parties for a determination of quantum in accordance with this decision. If agreement cannot be reached by the parties within 60 days from receipt of the decision, they should apply to the Board for further action in that matter.

The Government's motion to dismiss is denied. Any motion, request, or procedural reservation made by

either party in its pleadings but not expressly discussed in this opinion has been fully considered by the Board and is also denied.

/s/ BERNARD V. PARRETTE
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ GENE PERRY BOND
GENE PERRY BOND
Chief Administrative Judge

**APPENDIX F**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

October 31, 1997

Mr. Joe Byrd
Principal Chief
Cherokee Nation
P.O. Box 948
Tahlequah, Oklahoma 74465-0948

Re: Contract Disputes Act Claim #ISG930002-02/03/04

Dear Chief Byrd:

This is to notify you of the final decision of the Indian Health Service (IHS) regarding your claim under the Contract Disputes Act (CDA), dated September 27, 1996. Your claim concerned the payment of indirect costs (IDC) for annual funding agreements (AFA) for fiscal years (FY) 1994, 1995, and 1996.

Before the ISH staff could begin analysis and make a determination on the amount of indirect costs owed to the Nation, the Nation and the IHS had to reconcile and agree on the total amount of direct costs that were paid under the three AFAs. I have a copy of a letter from Mr. Rick Kelly, Director, Office of Administration and Fiscal Management, Health Services, Cherokee Nation, dated September 2, 1997. In his letter and on behalf of the Nation, he agrees to the direct funding levels established during reconciliation as follows:

FY 1994 - $18,377,612
FY 1995 - $24,332,802
FY 1996 - $24,681,697

Based on this reconciliation, IHS paid the Nation indirect costs consistent with the IHS contract support policy and pursuant to the provisions in each of the AFAs. Section 6 of each of the AFAs states that the amount of funds for indirect costs shall be established and paid based upon the Nation's indirect cost rate. Thus, the IHS staff calculated the indirect cost (IDC) amounts using the Nation's applicable IDC rate for the three applicable years. The Nation's Indirect Cost Rate Agreements for these three fiscal years were negotiated with the Department of Interior, Office of Inspector General. Each IDC rate is to be applied against the total amount of direct costs, minus items passed through in the rate agreement. Examples of pass through items include such things as capital expenditures (equipment, etc.) and subcontracts over a specified dollar amount.

The enclosed document details, for each of the three fiscal years, the amount of direct funding; an estimate of the costs exempted under the IDC rate agreements; the IDC rate applied; the amount of funding required for IDC; the amount of IDC paid; and the balance over or under funded. The IHS calculations for indirect costs show that:

In FY 1994, the IHS overpaid the Nation by $143,319 based on an IDC rate of 14.3%.

In FY 1995, the Nation's need for IDC exceed the IHS payment by $945,485 based on an IDC rate of 17.1%.

In FY 1996, the IHS overpaid IDC costs by $6,230 based on a 12.2% IDC rate.

The IHS recognizes that the Nation had a shortfall in FY 1995 of $945,485. However, IHS was unable to meet the Nation's full need for a number of reasons. First, Congress did not provide the agency with sufficient funds for Contract Support Costs (CSC) to meet the total need of tribes for indirect costs. Congress clearly anticipated shortfalls in the area of CSC. For example, Section 106(c) of the Indian Self Determination Act (ISDA), requires that all CSC shortfalls be reported to Congress. Consistent with this requirement, the IHS reported the amount of the Nation's shortfall to Congress.

Second, the compact states that the funding amounts are subject to appropriation.[1] Moreover, Section 106(b) of ISDA states that the provision of funds under the AFAs is subject to the availability of appropriations. Thus, all amounts in the AFA were made subject to appropriation.

Third, the AFAs contain various provisions which indicate that the amount specified for indirect costs/ contract support costs was not a sum certain. In FY 1994, Section 6 states that the amount of funds allocated to the Nation for indirect costs is "subject to the availability of appropriations for this purpose." In FY 1994 and FY 1995, Section 7 and Section 10 respectively state, "The parties agree that adjustments may be made due to Congressional action. . . ." In FY 1996, Section 10 states, "The parties agree that adjustments may be appropriate due to unanticipated Congressional action." We also note that, prior to signing the FY 1996 AFA, the IHS added a final paragraph on page 8 which stated that contract support costs were considered an

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[1] Article IV, Section 3.

unresolved issue subject to further negotiation. Thus, the AFA language anticipates further adjustments based on Congressional action and/or further negotiation by the parties.

Fourth, Section 106(b) of the statute makes it clear that IHS is not required to meet the Nation's total need for indirect costs where such action would reduce the funds otherwise available to other tribes. IHS only received a limited amount of appropriated funds and allocated such funds based on the need of all tribes.

Therefore, the Nation's CSC claim is hereby denied. This is a final decision. You may appeal this decision to the Interior Board of Contract Appeals (IBCA), U.S. Department of Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the IBCA and provide a copy to the individual form whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract (compact) number. Instead of appealing to the IBCA, you may bring an action to the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

Sincerely,

/s/ M. KAY CARPENTIER
M. KAY CARPENTIER
Chief Grants Management Officer
Division of Acquisition and Grants Management

Enclosure:

o IHS Spreadsheet - Cherokee Nation CDA Claim.

cc: Lloyd Miller, Attorney
Barbara Hudson, OGC
Paula Williams, OTSG
Meghan Kelly, DLRA
Executive Secretariat

## Cherokee Nation CDA Claim

**FISCAL YEAR 1994**

| | | | |
|---|---|---|---|
| Total Direct Cost Funding | $18,377,612 | | |
| Less — Sallisaw Program Base (Per ISD #92-1) | | $2,236,500 | |
| (Less — Stilwell Program Base Per ISD #94-1) | | 4,084,000 | |
| Less — Subcontracts (Pass-through >$5,000) | | 2,044,926 | |
| Less — Capital expenditures | | 1,228,845 | |
| Net Direct Cost Base | | | $8,783,341 |
| IDC Need @ 14.3% | | | $1,256,018 |
| IDC Paid | | | 1,399,337 |
| IDC Over-recovery | | | $143,319 |

**FISCAL YEAR 1995**

| | | | |
|---|---|---|---|
| Total Direct Cost Funding | $24,332,802 | | |
| Less — Sallisaw Program Base (Per ISD #92-1) | | $2,236,500 | |
| Less — Stilwell Program Base (Per ISD #94-1) | | 4,084,000 | |
| Less — Contract Health Outpatient Program (Per ISD #95-54) | | 1,517,659 | |
| Less — Subcontracts (Pass-through >$5,000) | | 497,947 | |
| Less — Capital expenditures | | 2,039,186 | |
| Net Direct Cost Base | | | $13,957,510 |
| IDC Need @ 17.1% | | | $2,386,734 |
| IDC Paid | | | 1,441,249 |
| IDC Shortfall | | | ($945,485) |

**FISCAL YEAR 1996**

| | | | |
|---|---|---|---|
| Total Direct Cost Funding | $24,681,697 | | |
| Less — Sallisaw Program Base (Per ISD #92-1) | | $2,236,500 | |
| Less — Stilwell Program Base (Per ISD #94-1) | | 4,084,000 | |
| Less — Contract Health Outpatient Program (Per ISD #95-54) | | 1,517,659 | |
| Less — Subcontracts (Pass-through > $5,000) | | 500,000 | |
| Less — Capital expenditures | | 2,000,000 | |
| Less — Medicare | | 411,608 | |
| Net Direct Cost Base | | | $13,931,510 |
| IDC Need @ 12.2% | | | $1,699,695 |
| IDC Paid | | | 1,705,925 |
| IDC Over-recovery | | | $6,230 |

**NOTES:**

- Subtracted program amounts in the ISD Fund before applying IDC Rate
- Amounts for sub-contracts taken from Nation's IDC proposals to the DOI/OIG
- Amounts for equipment taken from Nation's IDC proposals to the DOI/OIG
- Medicare reimbursements excluded because the IDC funding for them is included in the base.

## APPENDIX G

## STATUTORY PROVISIONS INVOLVED

1. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n, provides in relevant part as follows:

**§ 450. Congressional statement of findings**

**(a) Findings respecting historical and special legal relationship, and resultant responsibilities**

The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

* * * * *

**§ 450a. Congressional declaration of policy**

**(a) Recognition of obligation of United States**

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

* * * * *

**§ 450b. Definitions—**

(f) "indirect costs" means costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under Section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided the last proviso in Section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under Section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

**§ 450f. Self-determination contracts**

**(a) Request by tribe; authorized programs**

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under Section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * * *

**(b) Procedure upon refusal of request to contract**

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and

the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to Section 450m-1(a) of this title.

* * * * *

**(d) Tribal organizations and Indian contractors deemed part of Public Health Service**

For purposes of section 233 of Title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, Title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under section 450f or 450h of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including an individual who provides health care

services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

* * * * *

**§ 450j. Contract or grant provisions and administration**

* * * * *

**(b) Payments; transfer of funds by Treasury for disbursement by tribal organization; accountability for interest accrued prior to disbursement**

Payments of any grants or under any contracts pursuant to Sections 450f and 450h of this title may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this part. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from

the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

**(c) Term of self-determination contracts; annual renegotiation**

(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

**§ 450j-1. Contract funding and indiret costs**

**(a) Amount of funds provided**

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any

organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

* * * * *

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

**(b) Reductions and increases in amount of fund provided**

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in Section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the

Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

**(c) Annual reports.**

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal

year accounting cycle, as authorized by Section 450j(d) of this title.

**(d) Treatment of shortfalls in indirect cost recoveries**

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * * * *

**(g) Addition to contract of full amount contractor entitled; adjustment**

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

**(*l*) Suspension, withholding, or delay in payment of funds**

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

* * * * *

**§ 450*l*. Contract or grant specifications.**

**(a) Terms**

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * * * *

**(c) Model agreement**

The model agreement referred to in subsection (a)(1) of this section reads as follows:

**"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.**

"(a) AUTHORITY AND PURPOSE.—

"(1) AUTHORITY.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related admini-

strative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

* * * * *

"(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

"(6) PAYMENT.—

"(A) IN GENERAL.—Payments to the Contractor under this Contract shall—

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) QUARTERLY, SEMIANNUAL, LUMP-SUM, AND OTHER METHODS OF PAYMENT.—

"(i) In general.—Pursuant to Section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.—If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly

payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) Applicability.—Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

"(11) FEDERAL PROGRAM GUIDELINES, MANUALS, OR POLICY DIRECTIVES.—Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * * * *

"(c) OBLIGATION OF THE CONTRACTOR.—

"(1) CONTRACT PERFORMANCE.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) AMOUNT OF FUNDS.—The total amount of funds to be paid under this Contract pursuant to Section 106(a) shall be determined in an annual funding

agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) CONTRACTED PROGRAMS.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

"(d) OBLIGATION OF THE UNITED STATES.—

"(1) TRUST RESPONSIBILITY.—

* * * * *

"(B) CONSTRUCTION OF CONTRACT.—Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) GOOD FAITH.—To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

* * * * *

"(e) OTHER PROVISIONS.—

"(2) CONTRACT MODIFICATIONS OR AMENDMENT.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the

form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) EXCEPTION.—The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to Section 106(b)(2), shall not be subject to subparagraph (A).

* * * * *

"(f) ATTACHMENTS.—

* * * * *

"(2) ANNUAL FUNDING AGREEMENT.—

"(A) IN GENERAL.—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

**§ 450m-1. Contract disputes and claims.**

**(a) Civil actions; concurrent jurisdiction; relief**

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under Section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

**(b) Revision of contracts**

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * * * *

**§ 450n. Sovereign immunity and trusteeship rights unaffected.**

Nothing in this subchapter shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States

2. The Omnibus Consolidated and Emergency Appropriations Act, 1998, Pub. L. No. 105-277, 112 Stat. 2681-278 to 2681-288 (1998), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

* * * * *

That the following sums are appropriated out of any money in the Treasury not otherwise appropriate, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1999, and for other purposes, namely:

* * * * *

DEPARTMENT OF
HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,950,322,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the

time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $373,801,000 for contract medical care shall remain available for obligation until September 30, 2000: *Provided further*, That of the funds provided, up to $17,000,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 2000: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: *Provided further*, That, notwithstanding any other provision of law, of the amounts provided herein, not to exceed $203,781,000 shall be for payments to tribes and

tribal organizations for contract or grant support costs associated with contracts, grants, self-governance compacts or annual funding agreements between the Indian Health Service and a tribe or tribal organization pursuant to the Indian Self-Determination Act of 1975, as amended, prior to or during fiscal year 1999: *Provided further*, That funds provided to the Ponca Indian Tribe of Nebraska in previous fiscal years that were retained by the tribe to carry out the programs and functions of the Indian Health Service may be used by the tribe to obtain approved clinical space to carry out the program.

* * * * *

Sec. 314. Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that for the Bureau of Indian Affairs tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

3. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321-189 (1996), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

* * * * *

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1996, and for other purposes

* * * * *

DEPARTMENT OF
HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limita-

tion: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $350,564,000 for contract medical care shall remain available for obligation until September 30, 1997: *Provided further*, That of the funds provided, not less than $11,306,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1997: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the

Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

4. The Department of the Interior and Related Appropriations Act, 1995, Pub. L. 103-332, 108 Stat. 2527-2528 (1995), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1995, and for other purposes, namely:

* * * * *

DEPARTMENT OF
HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVII and section 208 of the Public Health Service Act with respect to the Indian Health Service, $1,713,052,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall

remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $351,258,000 for contract medical care shall remain available for obligation until September 30, 1996: *Provided further*, That of the funds provided, not less than $11,603,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1996: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended,

shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

5. The Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. 103-138, 107 Stat. 1408 (1993), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1994, and for other purposes, namely:

* * * * *

DEPARTMENT OF
HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles III and XXVII and section 208 of the Public Health Service Act with respect to the Indian Health Service, $1,645,877,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided,* That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further,* That $12,000,000 shall

remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $337,848,000 for contract medical care shall remain available for obligation until September 30, 1995: *Provided further*, That of the funds provided, not less than $11,526,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1995: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended,

shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.